SUPREME COURT, U. S.

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No. 181

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

THE FINN EQUIPMENT COMPANY,
Petitioner,

vs.

JOHN TRACY,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Finn Equipment Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this cause on May 9th, 1961.

OPINIONS, JUDGMENTS AND ORDERS BELOW.

Copies of the following pleadings filed in the United States District Court are contained in the Appendix hereto. The abbreviation "A" refers to the appendix to this petition.

Complaint (A. 1-A. 6).
Answer (A. 6-A. 9).
Motion for Judgment on the pleadings, and or for partial summary judgment (A. 9-A. 10).
Order overruling and disallowing motion (A. 10).
Motion for Judgment on the pleadings, and or for partial summary judgment (A. 11).
Judgment (A. 12).
Motion for Judgment Non Obstante Veredicto, or in the alternative for a new trial (A. 13-A. 23).
Memorandum Opinion, District Court (A. 23-A. 28).
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Order pertaining to discretionary appeal by plaintiff (A. 29-A. 30).
Order granting discretionary appeal to plaintiff (A. 30-A. 31).
Charge of District Court (A. 31-A. 47).
Final Judgment entered pursuant to rule 54 (b), Federal Rules of Civil Procedure (A. 48-A. 49).
Opinion U. S. Court of Appeals for the Sixth Circuit (A. 50-A. 54).
Judgment U. S. Court of Appeals for the Sixth Circuit (A. 54-A. 55).

Upon motion made by petitioner, said Court of Appeals stayed its mandate on said judgment upon condition that a petition for writ of certiorari be filed with this Court.

JURISDICTION.

Jurisdiction to review by writ of certiorari the judgment of said Court of Appeals entered May 9, 1961, is invoked under the provisions of 28 U. S. C. A., Sec. 1254 (1) and Section 1651 (a).

QUESTIONS PRESENTED FOR REVIEW.

(1) We adopt as one of the questions that one posed by the Court of Appeals for the Sixth Circuit, as follows:

> "In federal court litigation, in the State of Tennessee in cases involving multiple claims, will a general verdict of the jury for the plaintiff be sustained by applying such general verdict to any of the claims for relief which are sound and supported by substantial evidence, even though other claims for relief may have been defective and improperly submitted to the jury, or not supported by substantial evidence?"

(2) Did the District Court commit prejudicial error in submitting to the jury Tracy's claim for damages based upon an alleged breach of an implied warranty in consequence of which, and in the interest of justice, the Court was required to grant a new trial?

CONSTITUTIONAL PROVISION INVOLVED.

The Seventh Amendment to the Constitution provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

STATUTE INVOLVED.

The Tennessee statute here involved is Sec. 20-1317, of the Tennessee Code Annotated:

> **"Verdict Applied to Good Count.**
>
> "If any counts in a declaration are good, a verdict for entire damages shall be applied to such good counts (Deriv. Act 1801, Ch. 6, Sec. 63).".

STATEMENT RESPECTING LITIGATION.

Hereinafter, petitioner, The Finn Equipment Company, will be referred to as "Finn", and respondent, John Tracy, as "Tracy".

Tracy, a citizen of New York, sought damages for personal injuries from Finn, a corporation organized under the laws of Ohio, and maintaining its principal place of business in Ohio, but having a place of business and agent upon whom process could be served, in the State of Tennessee.

Tracy asserted two grounds for his cause of action:

(1) Negligence on the part of Finn in the design of the machine;

(2) Breach of implied warranty of the safety of the machine for the use to which it was to be put (A. 1-A. 6).

Finn entered into a sales agreement with Meadow Brooks Nurseries, Inc., a New Jersey corporation, and pursuant thereto delivered a mulching machine to the purchaser in Brooklyn, New York. Thereafter, and on September 10, 1958, Tracy sustained injuries while cleaning certain mulching materials from the blades of the blower fan in the machine (A. 1-A. 6).

Admittedly there was no privity between Tracy and Finn. Therefore Finn moved the Court for judgment on

the pleadings, and or for partial summary judgment seeking an adjudication that Tracy failed to state a cause of action for an alleged breach of an implied warranty (A. 9-A. 10-A. 11).

The motion was overruled (A. 10).

Thereafter, the Court gave prejudicial instructions to the jury, respecting Tracy's right to recover damages for an alleged breach of an implied warranty, to which instructions exceptions were duly made (A. 31-A. 47).

The jury returned a general verdict for Tracy, awarding damages of $65,000.00.

Finn seasonably moved the Court for a judgment non obstante veredicto, or in the alternative for a new trial (A. 13-A. 23).

The Court overruled the motion for judgment non obstante veredicto, but granted Finn a new trial for error in failing to sustain Finn's motion for judgment on the pleadings, and or for partial summary judgment, and for error in charging the jury on the claim based upon an alleged breach of implied warranty (A. 23-A. 28).

Tracy perfected two appeals to the Court of Appeals, for the Sixth Circuit, one in consequence of a final judgment entered pursuant to rule 54 (b) Federal Rules of Civil Procedure (A. 48-A. 49). The other in consequence of Sec. 1292 (b), Title 28 U. S. C. A. (A. 29-A. 30).

The Court of Appeals pretermitted all questions save one, i. e., the applicability of Sec. 20-1317, Tennessee Code Annotated. The Court of Appeals reversed the order of the District Court, granting a new trial, and held, despite the provisions of the Seventh Amendment to the Constitution of the United States, that a State statute of Tennessee, pertaining to procedure in State Courts, must be given effect in diversity actions tried in Federal Courts of Tennessee.

REASONS FOR GRANTING THE WRIT.

I. The entry of judgment in the Court of Appeals for Respondent Tracy, applying a procedural statute of the State of Tennessee, has deprived petitioner Finn of its rights, secured by the Seventh Amendment to the Constitution of the United States, to have facts tried by a jury re-examined only in accordance to the rules of the common law.

Tracy, a resident of New York, who was injured in New York by a machine sold in Ohio, by an Ohio corporation, to a New Jersey purchaser, which machine was delivered to New York in consummation of the purchase, chose the United States District Court in Tennessee, as a forum. Having done so, he now insists that procedural statutes of the State of Tennessee, having application alone to State Courts, shall be given force and effect in the United States District Court, in Tennessee, though giving effect thereto would violate the provisions of the Seventh Amendment to the Constitution of the United States of America, which provides that no fact tried by a jury shall be otherwise re-examined in any Court of the United States, **than according to the rules of the common law** (Emphasis supplied).

The Court of Appeals for the Sixth Circuit cited as a precedent, **Louisville & Nashville Railroad Co. v. Rochelle,** 252 F. 2d 730 (1958); and **Atlantic Coastline Railroad Co. v. Smith,** 264 F. 2d 428 (1959).

In L & N Railroad Co. v. Rochelle, the ruling of the Court was but dictum. Were it otherwise the Court did not consider nor deal with an erroneous charge, which under applicable federal decisions, suffices to vitiate an entire verdict.

Again, in Atlantic Coastline Railroad Co. v. Smith, the holding of the Court respecting Sec. 20-1317 T. C. A., was dictum.

In **Majestic v. L & N Railroad**, 147 Fed. (2d) 621, the Court refused to give application to Sec. 20-1317, T. C. A., where a general verdict had been rendered. The Court stated:

> "In jury trials erroneous rulings embodied in instructions are presumptively injurious and furnish grounds for reversal unless it affirmatively appears they were harmless. Fillippon v. Albion Vein Slate Company, 250 U. S. 76, 82, 39 S. Ct. 435, 63 L. Ed. 853. From an examination of the entire record, we are of the opinion that the instructions complained of by appellant were harmful and calculated to mislead the jury.' Cause reversed and remanded to the District Court for a new trial and for further and other proceedings in conformity with this opinion."

A like result obtained in **Louisville & Nashville Railroad Co. v. Farmer**, 220 Fed. (2d) 90, wherein the Court did not apply Sec. 20-1317 T. C. A. The Court stated in part:

> "The jury rendered a general verdict, from which it cannot be determined whether it found for appellees on the theory based upon alleged violation by appellant of section 2628 (4) of the Code of Tennessee, or on appellees' theory based on the alleged violation of the Springfield city ordinance. Accordingly, our only recourse is to grant a new trial, at which the court will correctly charge the jury in compliance with this opinion."

From the foregoing, it is to be observed that the Sixth Circuit Court of Appeals, in the **Majestic** and **Farmer** cases, apply the principles of the common law, while in the **Rochelle** and **Smith** cases, by dictum, the Court approved the application of Sec. 20-1317 T. C. A.

The Court of Appeals for the Sixth Circuit, further relied upon **Guaranty Trust Co. v. York**, 326 U. S. 99, and **Byrd v. Blue Ridge Electric Coop.**, 336 (356) U. S. 525, as au-

thority for the application of the Tennessee procedural statute.

Finn respectfully submits that neither the **Guaranty Trust Company** case, nor the **Byrd** case, are supportive of the result attained by the Court of Appeals.

In the **Guaranty Trust Company** case, supra, the Court had under consideration the applicability of a statute of limitations of New York, and whether same would be applied to bar the right of action of the plaintiff in a suit for equitable relief in a federal court. The Supreme Court, in deciding that the Federal court must follow and apply the New York statute of limitations, held that said statute of limitations was so vitally a part of plaintiff's right of action that the limitations statute could not be divorced or separated from the substantive rights of the plaintiff. In so holding the Court stated:

> "Plainly enough, a statute that would completely bar recovery in a suit if brought in a State court bears on a State-created right vitally and not merely formally or negligibly. As to consequences that so intimately affect recovery or non-recovery a federal court in a diversity case should follow State law" (89 L. ed. 2087).

It is respectfully submitted that Section 20-1317, T. C. A., is **purely a Tennessee procedural statute**, and in no way bears upon Tracy's right of action against Finn for his alleged injuries suffered as a result of accident in the State of New York. In other words, in the case at bar, Tracy is trying to invoke the Tennessee procedural statute in a federal court in aid of a New York created right of action. It is respectfully submitted that the Tennessee procedural statute forms no part of Tracy's right of action, or substantive right created for him by the law of New York, which alone is applicable to his common law negligence count.

In the **Byrd** case, the Court had under consideration the South Carolina Workmen's Compensation statute, and a state court decision construing said statute holding that it was **for the Judge and not the jury** to decide on the evidence whether the owner was a statutory employer within the meaning of the statute. The Supreme Court of the United States, in holding that the Federal Courts were not bound by the procedural decisions of the State Court of South Carolina, and in holding that on remand the aforesaid factual question should be submitted to the jury, rather than the court, for determination, said:

> "But cases following Erie have evinced a broader policy to the effect that the federal courts should conform as near as may be **in the absence of other considerations** to state rules even of form and mode where the state rules may bear substantially on the question whether the litigation would come out one way in federal court and another way in the state court if the federal court failed to apply a particular local rule. E. g., Guaranty Trust Co. v. York (U. S.), supra; Bernhardt v. Polygraphic Co. of America, Inc., 350 U. S. 198, 100 L. ed. 199, 76 S. Ct. 273. Concededly the nature of the tribunal which tries issues may be important in the enforcement of the parcel of rights making up a cause of action or defense, and bear significantly upon achievement of uniform enforcement of the right. It may well be that in the instant personal injury case the outcome would be substantially affected by whether the issue of immunity is decided by a judge or a jury. Therefore, were 'outcome' the only consideration, a strong case might appear for saying that the federal court should follow the state practice.
>
> "But there are affirmative countervailing considerations at work here. The federal system is an independent system for administering justice to

litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common law actions, it distributes trial functions between judge and jury and, **under the influence—if not the command**—of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. Jacob v. New York, 315 U. S. 752, 86 L. ed. 1166, 62 S. Ct. 854. The policy of uniform enforcement of state-created rights and obligations, see e. g., Guaranty Trust Co. v. York (U. S.), supra, cannot in every case exact compliance with a state rule not bound up with rights and obligations which disrupts the federal system of allocating functions between judge and jury. Herron v. Southern P. Co., 283 U. S. 91, 75 L. ed. 857, 51 S. Ct. 383. Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.

"We think that in the circumstances of this case the federal court should not follow the state rule." (Emphasis supplied.) (2 L. ed. 2d, pp. 962-963.)

Further, the court in the **Byrd** opinion, stated:

"**We have discussed the problem upon the assumption that the outcome of the litigation may be substantially affected by whether the issue of immunity is decided by a judge or a jury.** But clearly there is not present here the certainty that a different result would follow, cf. Guaranty Trust Co. v. York, 326 U. S. 99, 89 L. Ed. 2079, 65 S. Ct. 1464, 160 A. L. R. 1231, supra, or even the strong possibility that this would be the case, cf. Bernhardt v. Polygraphic Co. of America, Inc., 350 U. S. 198, 100 L. Ed. 199, 76 S. Ct. 273, supra. There are factors present here which

might reduce that possibility. The trial judge in the federal system has powers denied the judges of many states to comment on the weight of evidence and credibility of witnesses, and discretion to grant a new trial if the verdict appears to him to be against the weight of the evidence. We do not think the likelihood of a different result is so strong as to require the federal practice of jury determination of disputed factual issues to yield to the state rule in the interest of uniformity of outcome." (2 L. Ed. 2d 963-964.) (Emphasis supplied.)

The Court of Appeals, for the Sixth Circuit, stated, in part, in its opinion:

> "The evidence that applied to the improper count was the same as that in support of the negligence contention, and prejudice is wanting."

Finn respectfully takes issue with this statement. The Court charged the jury respecting "the improper count" that under the law of the State of Ohio, privity was unnecessary (A. 34-A. 35, A. 41); that warranty of fitness would run to an employee of the purchaser (A. 35); that the jury could find for Tracy on the question of implied warranty (A. 41); that damages should be awarded for the breach of an implied warranty (A. 41); that the statutes of Ohio pertaining to warranties had application (A. 46); in failing to give Finn's special request, that Tracy could not rely upon an alleged breach of an implied warranty (A. 23); in failing to charge Finn's special request that there was no implied warranty upon which Tracy could rely (A. 25).

Apropos all statements of this Honorable Court in the **Byrd** case, can it be said in the case at bar, that upon a retrial of the case on the first, or common law count of Tracy's complaint, that another jury will reach a different

conclusion from that of the first jury, with regard to the same count? In other words, do we now know what decision the jury reached with regard to the first count under its general verdict? If not, how can it now be stated that a second jury will reach a different conclusion with regard thereto. It seems that to ask the foregoing question in effect answers the problem posed for this Court's consideration.

Section 20-1317 T. C. A. Does Not Embody the Common Law Rule.

The rule in Tennessee under Code Sec. 20-1317 is not the common law. This is expressly recognized in a leading Tennessee Text, **Caruthers History of a Law Suit (Seventh Edition, 1951), Sec. 384.** Section 20-1317 T. C. A. was derived from an early legislative act in 1801. The act was entitled "An Act to Regulate the Proceedings of the Court of Equity and for the Amendment of the Law." Sec. 63, provided, "That where there are several counts one of which is faulty, and entire damages is given, the verdict shall be good; but the plaintiff may apply to the court to instruct the jury to disregard such faulty count." Scott, Law of Tennessee, 1715-1820, Vol. 1, Pt. 2, p. 694.

In an early case the Court pointed out that the rule was contrary at common law to that embodied in the 1801 Act. **Prusell v. Archer, Peck (Tenn. 1824), 317, at 319.**

In the Federal Courts, State Procedure Cannot Constitutionally Be Applied When the Effect Is to Prevent the Defendant From Having a Jury Trial as at Common Law, and to Deprive It of a Review That Is Different Than That at Common Law.

In **Parson v. Bedford (1831), 28 U. S. 433,** it was held that suits at common law meant all suits not of equity or admiralty jurisdiction.

One of the basic elements of the right to a jury trial is the province of the jury to determine fact issues under **appropriate instructions** by the court. (Emphasis supplied.) **Baltimore and Carolina Line, Inc., v. Redman (1935), 293 U. S. 654.**

Litigants cannot by state rules of procedure be deprived of fundamental rights guaranteed by the Constitution and Laws of the United States, such as the right to trial by jury. **Lyon v. Mutual Benefit Health and Accident Association** (1939), 305 U. S. 484, rehear. den. 306 U. S. 667.

Under the Seventh Amendment, a United States trial judge does not have the authority which a state judge may have of granting a new trial upon condition, i. e., the trial judge may not condition the denial of a plaintiff's motion for a new trial upon defendant's consent to increase to a specified amount damages awarded by the jury. **Dimick v. Schiedt** (1935), 293 U. S. 474.

The principle that the common law may be adapted to meet varying conditions does not apply in determining scope and meaning of the Seventh Amendment, which, in respect to jury trials, adopted common law rules as they existed in 1791. **Dimick v. Schiedt** (1935), 293 U. S. 474.

The Federal Court of Appeals, in a diversity case, will follow the federal rule that questions pertaining to the excessiveness of a verdict is for the Federal Trial Court and will not follow the rule of the State Supreme Court in disregard of the Seventh Amendment. **Reid v. Nelson** (C. C. A. 5th, 1946), 154 F. 2d 724, cert. den. 323 U. S. 718, rehear. den. 323 U. S. 813.

This case is most significant. It was there urged that a state rule in Florida, which permitted and required a state appellate court to reduce verdicts which it considered excessive, was applicable under Erie R. v. Tompkins. The court said:

"The decision in Erie R. Co. v. Tompkins, supra, could not have the effect of requiring this court to follow the state court in disregard of the Seventh Amendment." 154 F. at 726.

In **Deupree v. Levinson** (C. A. 6th, 1950), 186 Fed. (2d) 297, 303-303 (Cert. den. Sup. Crt. U. S.—341 U. S. 915, 95 L. Ed. 1351), the court held that in diversity cases the substantive right created by statute is controlled by state law, but **procedural matters** are governed by the law of the forum (Federal Courts).

To similar effect see:

Diedrich v. American News Co. (C. C. A. 10th, 1942), 128 F. 2d 144;

McKeon v. Central Stamping Co. (C. C. A. 3rd, 1920), 264 F. 385;

Burcham v. J. P. Stevens & Co. (C. A. 4th, 1954), 209 F. 2d 35;

Howard v. Louisiana & A. Ry. Co. (C. C. A. 5th, 1931), 49 F. 2d 571;

Highey v. Sullivan (C. C., Ohio, 1897), 80 F. 72;

Wright v. Paramount-Richards Theatres (C. A. 5th, 1952), 198 F. 2d 303;

Werthan Bag Corp. v. Agnew and Agnew v. Werthan Bag Corp. (C. A. 1953), 202 F. (2d) 119;

Youdan v. Majestic Hotel Management Corp. (C. A. 1942), 125 F. 2d 15.

The Majority of Federal Decisions Approve the Granting of a New Trial When Error Exists in an Improper Charge on One Claim, or an Error in Submitting One Claim to the Jury.

In **Detroit, T. & I. R. Co. v. Banning** (CCA 6th, 1949), 173 Fed. (2d) 752 (cert. den. 338 U. S. 815), the Court held that where only one of two alleged grounds of negli-

gence should have been submitted to the jury, which returned a general verdict for the plaintiff, and **there was no way to determine on which of the two issues the verdict was based, a new trial was required.** (Emphasis supplied.)

To the same effect is **Chesapeake & Ohio Ry. Co. v. Thomas** (CA 4th, 1952), 198 F. (2d) 783 (cert. den. 344 U. S. 921). In this case the Court improperly instructed the jury as to one ground of negligence, but properly instructed it on the other. The Court held this to be reversible error, stating:

> "Since the jury could have based its finding of negligence on this ground as well as on the other one charged, it being a general verdict, the instruction was prejudicial to the defendant and the case must be remanded for a new trial." (at p. 788.)
>
> . . . . . .
>
> "To allow such a question as is here involved to reach the jury would be to mask a wisp of suspicion with the cloak of hard fact" (at p. 788).

To the same effect see:

Roth v. Swanson (CCA 8th, 1944), 145 F. 2d 262;
Northern Pacific Ry Co. v. Haugan (CA 8th, 1950), 184 F. 2d 472;
Baltimore & O. R. Co. v. Deneen (CCA 4th, 1947), 161 F. 2d 674;
Baltimore and O. R. Co. v. Reeves (CCA 6th, 1926), 10 F. 2d 329;
Atlantic Coast Line R. Co. v. Tiller (CCA 4th, 1944), 142 F. 2d 718;
Fidelity & Casualty Co. of New York v. Fornaro Co. et al., (CCA 6th Cir., 1942), 130 F. (2d) 877.

Citing with approval: **Fillippon v. Albion Vein Slate Co.**, 250 U. S. 76, 39 S. Ct. 435, 61 L. Ed. 853.

Also see:

Chicago & N. W. R. Co. v. Garwood (CCA 8th, 1948), 167 F. 2d 848;

North American Graphite Corp. v. Allan (C. A., D. C. 1950), 184 F. 2d 387;

Patton v. Wells (CCA 8th, 1903), 121 F. 337;

Travelers' Ins. Co. v. Wilkes (CCA 5th, 1935), 76 F. 2d 701;

Mercer v. Byrons et al. (CA 1st, 1952), 200 F. (2d) 284.

Federal Rules of Civil Procedure Provide for Granting of New Trial.

The Federal Rules of Civil Procedure expressly provide for the granting of new trials without reference, in diversity cases, to states' statutes, or decisions. **Rule 59, Federal Rules of Civil Procedure**, provides in pertinent part, as follows:

> "New Trials: Amendment of Judgments—
>
> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States;"

It is significant to note that provision is thus made for the granting of new trials, for any other reasons for which new trials have been granted in actions at law "in the courts of the United States".

In this procedural matter, the Federal Rules apply. **Erie Railroad Company v. Tompkins**, 304 U. S. 64, 59 Sup. Ct. 817, can have no application, in that this deals with substantive law, not procedural.

In **Barron and Holtzoff, Federal Practice and Procedure** (Rules Ed. 1950), Vol. 1, Sec. 8, p. 25, it is stated:

> "So far as federal procedure is concerned, the federal rules govern, the Conformity Act is superceded, and state laws or rules of practice are without force . . .
>
> "The federal rules governing procedure, and the Erie doctrine requiring application of state laws to matter of substance theoretically cover mutually exclusive fields."

Finn respectfully submits that the Court of Appeals for the Sixth Circuit erred in applying a Tennessee procedural statute, at variance with the common law, when re-examining matters tried by a jury,—this in contravention of the provisions of the Seventh Amendment to the Constitution of the United States of America.

II. The District Court erred in refusing to grant Finn's motion for judgment on the pleadings, and or for partial summary judgment, and in charging the jury that Tracy could recover damages for breach of an implied warranty. Having so erred, the Court properly granted Finn's motion for a new trial.

The Court of Appeals, pretermitted all questions, with the exception of the application of Sec. 20-1317, T. C. A. Nevertheless, Finn respectfully submits that it is proper to herein set forth its contentions respecting the law applicable to Tracy's right of action for an alleged breach of an implied warranty.

Tracy's Action for Breach of Implied Warranty Controlled by New York Decisions.

There is no principle of conflict of law that is better settled than that the lex loci delictus controls all matters of

substance. **Restatement Conflicts of Law, Secs. 378, 389, Beale, Conflict of Laws, Sec. 1288 ffw. (1935).**

In **Goldberg, Admrx., v. American Airlines, Inc., et al.,** 199 N. Y. S. (2d) 134 (February 16, 1960), the Court considered an action for wrongful death based upon breach of warranty, and stated:

> "It is the place of injury that determines the rights of the parties, and where recovery is sought on the theory of breach of warranty, the governing law is that of the jurisdiction in which the accident rather than the sale took place. (Poplar v. Bourjois, Inc., 298 N. Y. 62, 80 N. E. (2d) 334) . . . But where, as here, the plaintiff's intestate made no contract with the defendant, the law of the place where other parties contracted can have no influence on the case."

To the same effect see **Hunter v. Derby Foods, Inc.,** 110 Fed. (2d) 970 (2nd Cir.).

New York Denies an Injured Party a Cause of Action for Personal Injury, for a Breach of an Implied Warranty, Where There Is No Privity Between the Parties.

Campo v. Scofield et al., 301 N. Y. 468, 95 N. E. Rep. (2d) 802;

Turner v. Edison Storage Battery Co., 248 N. Y. 73, 161 N. E. 423;

Timpson v. Marshal, Meadows and Stewart, Inc., et al., 101 N. Y. Sup. (2d) 583;

Chysky v. Brake Bros. Co., Inc., 235 N. Y. 468, 139 N. E. 576;

Inman v. Binghampton Housing Authority, 3 N. Y. (2d) 137, 143 N. E. (2d) 895;

Messina v. Clark Equipment Company, 263 Fed. (2d) 291.

Typical of the holdings in each of the cases above is the statement of the Court in the **Campo** case:

"Since there is no claim of privity of contract between the defendant manufacturer and plaintiff, the complaint cannot, of course, be sustained on any theory of implied warranty."

Tracy Does Not Have an Action Against Finn for an Alleged Breach of an Implied Warranty Under Applicable Ohio Statutes and Decisions.

If Finn be mistaken in its asserted belief that applicable New York decisions are controlling, and if the applicable decisions of Ohio are to be regarded as controlling, even so, Tracy may not assert a claim for his injuries sustained in New York, based upon an alleged breach of an implied warranty.

The Statutory Law of Ohio Negates an Implied Warranty From Finn to Tracy.

Baldwin's Ohio Revised Code, Sec. 1315.16, describes a "sale in which warranty is implied."

Under the factual situation, in the case at bar, there could have been no such implied warranty, pursuant to statute, in that Meadow Brooks Nurseries, Inc., received, examined and used the Finn mulch spreader, and Tracy himself examined and used the spreader, prior to his injury.

In **American Radiator & Standard Sanitary Corp. v. The Titan Valve & Manufacturing Co.**, 246 Fed. (2d) 947 (6th Cir. 1957), Section 1315.16, Revised Code of Ohio, was considered. The Court there held that where a purchaser made his own inspection which should have revealed the defects, there could be no recovery for breach of implied warranty.

Tracy May Not Assert a Claim for Breach of an Implied Warranty, Under Ohio Decisions, in That There Was No Privity of Contract.

The Appellate decisions of Ohio require privity before an action can be maintained for breach of an implied warranty. The following authorities substantiate this statement:

Wood v. General Electric Co., 159 Ohio St. 273, 112 N. E. (2d) 8 (1953);

Welsh v. Ledyard, dba Western Auto Stores, 167 Oh. St. 57, 146 N. E. (2d) 299 (Supreme Court of Ohio 1957);

Canton Provision Co. v. Gauder, 130 Oh. St. 43, 196 N. E. 634;

Steele, Admrx. v. Westinghouse Electric Corp., 159 N. E. (2d) 469 (Court of Appeals of Ohio, Jan. 30, 1958).

The following authorities relied upon by Tracy **do not** support his assertion that privity is unnecessary to the maintenance of an action for breach of implied warranty.

Rogers v. Toni Home Permanent Co., 167 Oh. 244, 147 N. E. (2d) 672 (Supreme Court of Ohio, Jan. 29, 1958).

This was a cause of action for breach of an expressed warranty.

Markovich v. McKesson & Robbins, Inc., 149 N. E. (2d) 181 (Court of Appeals of Ohio, April 2, 1958).

This was a case in which the Court held that an action could be maintained for breach of an express warranty.

Since the rendition of the two opinions aforementioned, the Court of Appeals of Ohio rendered an opinion in **June**

Kennedy, Plaintiff-Appellant, v. General Beauty Products, Inc., Defendant-Appellee, 167 N. E. (2d) 116.

Noteworthy is the fact that the opinion of the Ohio Court of Appeals in the **Markovich** case was written by Judge Skeel. Judge Skeel similarly wrote the opinion in the **Kennedy** case, in which it was held that in the absence of privity there could be no action for breach of implied warranty.

From the foregoing it is to be noted that the last decision from an Ohio Appellate Court requires privity before an action may be maintained for breach of implied warranty.

CONCLUSION.

For the reasons herein stated, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

THE FINN EQUIPMENT COMPANY,

By John H. Doughty
JOHN H. DOUGHTY.

Of Counsel:

HODGES, DOUGHTY and CARSON,
Attorneys at Law,
712-23 Hamilton National Bank Building,
Knoxville, Tennessee.

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COMPLAINT.

(Filed January 22, 1959.)

Comes the plaintiff, John Tracy, and complains of the defendant, The Finn Equipment Company, and for the basis of such complaint avers the following facts:

I.

That he is a citizen and resident of the state of New York. That the defendant, The Finn Equipment Company, is an Ohio Corporation duly qualified to do and doing business in the state of Tennessee, and has appointed an agent for the service of legal process in the State of Tennessee, namely James R. Dial, Jr., 302 Scottish Pike, Knoxville, Tennessee. That the defendant maintains a regular place of business in Knoxville, Tennessee, and is subject to the jurisdiction of this court by the service of process upon the aforementioned agent.

II.

That the amount in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00) exclusive of interest and costs, and that the jurisdiction of this court is founded upon the aforesaid diversity of citizenship and the nature and amount in controversy.

III.

Plaintiff states that he is by trade a landscape laborer, which is the only trade which he knows or for which he is qualified, and that on September 10th, 1958, and for a period of approximately nine years prior thereto, plaintiff was employed by the Meadow Brook Nurseries, Inc. of Englewood, New Jersey. Plaintiff avers that he is presently thirty-nine (39) years of age, married, with two children. Plaintiff further avers that the defendant, The

Finn Equipment Company, is a manufacturer of machinery and equipment, among which is soil erosion equipment; that the defendant produced for sale, among other kinds of equipment, a power driven machine known and designated as a "Finn Mulching Machine", Serial Number G466; that the purpose of the said machine is to mulch or otherwise chop up and disintegrate hay, straw, or other such substances and then to blow the mulched material through a nozzle onto the surface of the ground.

IV.

Plaintiff avers that approximately two weeks prior to September 10, 1958, plaintiff's employer, Meadow Brook Nurseries, Inc., purchased a new Finn Mulching Machine from the defendant, the sale transaction being consummated at the defendant's plant in Cincinnati, Ohio. That on September 10, 1958, the plaintiff was employed in his work and engaged in certain landscaping work at Floyd Bennett Field in Brooklyn, New York, and that during his work, the plaintiff had occasion to assist in the operation of the Finn Mulching Machine. Plaintiff would further show that during the course of the machine's operation, the blower fan became jammed or inoperable with material that was being mulched, thereby causing the machine to malfunction. That the machine is so designed as to provide a "clean out" door which when opened exposes the blower fan, thus giving the operator or crew member of the machine access to clear the blower fan manually.

That as the blower fan thus became jammed, the plaintiff first disengaged a clutch mechanism, which stopped the operation of the blower fan, and then attempted to clean out the hay from around the blower fan. The clutch was then re-engaged in order to ascertain whether or not the fan would function properly. Upon seeing that the

fan was still jammed, the plaintiff reopened the clean out door and attempted to clear the fan blades, and while plaintiff was thus working on the machine, the blower fan suddenly began to revolve at high speed and caught plaintiff's left forearm and hand in the fan blades, all of which resulted in plaintiff sustaining very serious personal injuries as will be detailed hereinafter.

V.

Plaintiff avers that the accident and his resulting injuries were proximately caused by defendant's failure to exercise due care in the design, engineering and manufacturing of the Finn Mulching Machine. Particularly, plaintiff avers that defendant was negligent in designing a power driven machine, such as the mulching machine in question, without providing on such machine a safety device or interlock on the clean out door or some other similar, suitable and reliable safety device or guard which would automatically stop the machine's operation when the clean out door is opened and while the operator or crew member is exposed to the blades of the blower fan, or which would prevent plaintiff or others using the equipment from bringing their hands and arms in contact with the revolving and dangerous portions of the machine. Plaintiff avers that the defendant knew or should have known or foreseen that the blower fan likely would become jammed on occasion and that the defendant foresaw or should have foreseen that an attempt manually to clear the machine would result in an accident such as the one involving the plaintiff.

Plaintiff further avers that the defendant as the designer, engineer and manufacturer of the machine had a greater knowledge than did the plaintiff of the machine's capabilities and the dangers inherent in the operation of the machine. That notwithstanding this superior knowl

edge, the defendant failed, refused and neglected to equip the machine with adequate and proper safety devices in order to protect from injury this plaintiff and all other similarly situated.

VI.

That as a direct and proximate result of the defendant's failure to exercise due care, and as a result of the plaintiff's accident, all as detailed hereinabove, the plaintiff's left forearm and hand were so severely crushed and torn that it was necessary surgically to amputate his hand and arm. Plaintiff avers that as a result of the injury he suffered extreme pain and discomfort and was greatly shocked and distressed emotionally. That during the course of his hospitalization, he was rendered very sick by reason of the antitoxin serum which had to be administered.

Plaintiff avers that he has incurred heavy but necessary expenses in connection with the treatment of his injuries and that it will be necessary for him to incur further medical expenses and that it will be necessary for him to submit himself to further surgery in order that the stump may be fitted with a prosthetic device. Plaintiff avers that as a result of the injuries sustained by him, he is greatly disabled and that his ability to pursue a gainful occupation and to enjoy a normal life has been substantially reduced, and plaintiff states that his disability is permanent in nature and will continue throughout the remainder of his life. Plaintiff further says that his income expectancy has been greatly and irreparably damaged and diminished and affects his ability to earn a living for himself and his family.

Wherefore, the plaintiff claims that he has a cause of action against the defendant and sues the defendant for the sum of One Hundred Twenty-five Thousand Dollars ($125,000.00) and demands a jury to try the cause.

VII.

Comes the plaintiff, John Tracy, and further complains of the defendant The Finn Equipment Company, and for the basis of such further complaint says:

VIII.

That when the defendant, The Finn Equipment Company, sold the mulching machine described hereinbefore to plaintiff's employer, Meadow Brook Nurseries, Inc., the defendant made certain express warranties concerning the design, performance ability, operation, and fitness for use of the mulching machine. Plaintiff avers that these express warranties made by the defendant were made to induce the plaintiff's employer to purchase the machine and that the purchase was made in reliance thereon. Plaintiff avers that these express warranties inured to plaintiff's benefit, and that by reason of the improper and unsafe design of the machine, particularly in the absence of appropriate safeguards, these express warranties have been breached by the defendant to the permanent damage and detriment of the plaintiff.

Plaintiff further says that in addition to the express and implied warranties made by the defendant and set forth in this complaint, the defendant by advertisements and literature made certain representations as to the fitness, suitability and safety of the piece of equipment which injured the plaintiff; that these representations constitute in law warranties which inure to the benefit of plaintiff herein, and that plaintiff and his employer relied upon said representations which have been breached and that as a result of the breaches of the representations, the plaintiff was injured to his damage and detriment.

In addition to the express warranties made by the defendant, there was as a part of the purchase and sale transaction, a warranty by the defendant implied in law,

that the particular machine was of merchantable quality and was fit and safe for the particular use for which it was manufactured or used. Plaintiff avers that this implied warranty likewise inured to his benefit, and avers that for the same reasons as aforestated, this implied warranty was breached by the defendant to the damage and detriment of the plaintiff.

Plaintiff avers that as a result of the defendant's breach of both the express and implied warranties, he was caused to suffer the injuries, damages and losses which have been detailed hereinbefore.

Wherefore, the plaintiff claims an additional cause of action against the defendant and sues the defendant for the further sum of One Hundred Twenty-five Thousand Dollars ($125,000) and demands a jury to try this further cause.

Zelenko & Elkind and Foster D. Arnett,

By /s/ Foster D. Arnett,

1210 Hamilton Natl. Bank Bldg.,
Knoxville, Tennessee.

ANSWER.

(Filed May 14, 1959.)

Comes The Finn Equipment Company, by its Attorneys, and for answer to plaintiff's complaint, says:

1. The defendant admits the allegations contained in Section I of plaintiff's complaint.

2. Defendant admits the allegations contained in Section II of plaintiff's complaint.

3. Defendant is not advised respecting plaintiff's trade, or avocation, and hence demands strict proof thereof.

4. Defendant admits that it is a manufacturer of machinery and equipment, among which is soil erosion equipment. That it manufactures and sells a machine known as the "Finn Mulch Spreader", which mulches straw and kindred substances, following which said mulch is spread upon the ground; that said machine is designated as Model G-466.

5. Defendant admits that it sold a mulch spreader, Model G-466 to Meadow Brook Nurseries, Inc., on August 13, 1958, and delivered said spreader to said purchaser. Defendant denies that the sales transaction was consummated at defendant's plant in Cincinnati, Ohio.

6. Defendant is advised that plaintiff was employed by Meadow Brook Nurseries, Inc., in September, 1958, which employer was engaged in certain landscaping work at Floyd Bennett Field, Brooklyn, New York. Defendant is not advised respecting the duties which were assigned to plaintiff by his employer, Meadow Brook Nurseries, Inc., and hence demands proof thereof.

7. Defendant admits that the machine which it manufactured was so designed as to permit access to the blower fan within. Defendant asserts that said design was proper, from an engineering standpoint, in all respects, affording access to the blower fan when cleaning processes were undertaken by the operators of the machine.

8. Defendant is not advised respecting plaintiff's alleged efforts to clean mulching material from the blower fan, nor is defendant advised respecting the injuries which plaintiff allegedly sustained in consequence thereof, wherefore defendant demands strict proof of said allegations.

9. Defendant denies that the injuries sustained by plaintiff stemmed from the defendant's failure to exercise due care in the design, engineering, and manufacture of the mulch spreader. With particularity, defendant denies all

allegations of negligence contained in Section "IV" of plaintiff's complaint.

10. Defendant is not advised respecting the injuries and damages which plaintiff allegedly sustained while in the employment of Meadow Brook Nurseries, Inc., and hence demands strict proof thereof.

11. Defendant denies that it made express warranties to Meadow Brook Nurseries, Inc., as by the plaintiff alleged. Defendant asserts that any warranties which it made were to Meadow Brook Nurseries, Inc., and not to plaintiff, and that said warranties did not inure to plaintiff's benefit.

12. Defendant denies that it made implied warranties to Meadow Brook Nurseries, Inc., as by the plaintiff alleged. Defendant asserts that any warranties which it made were to Meadow Brook Nurseries, Inc., and not to plaintiff, and that said warranties, either express or implied, did not inure to plaintiff's benefit.

13. Defendant denies that it was guilty of any act of negligence, or that it breached any warranty, express or implied, which proximately caused plaintiff's injuries and damages.

14. Plaintiff was guilty of contributory negligence which proximately caused or contributed to the accident of which he complains, barring his recovery.

15. Plaintiff assumed the risk incident to his employment, and hence may not assert a cause of action against defendant.

16. Defendant asserts that plaintiff's injuries, with resulting damages, stemmed from an independent, intervening, and efficient cause, which insulated defendant from plaintiff's claims.

17. Plaintiff has received workmen's compensation benefits from Royal Globe Insurance Company, pursuant to the Workmen's Compensation Law of the State of his employment. In consequence the workmen's compensation insurance carrier, having a lien for all payments made, is a necessary party plaintiff.

/s Hodges, Doughty & Carson,
Hodges, Doughty and Carson, Attorneys.

Certificate of Service.

I certify that a true copy of the foregoing has been served upon counsel for all parties by delivering a copy to the offices of said counsel or by placing a copy in the United States mail, addressed to counsel at his office, with sufficient postage thereon to carry the same to its destination. This 13 day of May, 1959.

Hodges, Doughty & Carson,
By /s J. H. Doughty.

MOTION FOR JUDGMENT ON THE PLEADINGS, AND OR FOR PARTIAL SUMMARY JUDGMENT.

(Filed October 7, 1959.)

Comes the defendant, The Finn Equipment Company, and pursuant to Rules 12 (c) and 56 (b), Federal Rules of Civil Procedure, moves the Court for a judgment on the pleadings, and or for a partial summary judgment, as follows:

> "That the Court find, adjudge, and declare, that plaintiff fails to state a claim upon which relief can be granted in 'Section VII', of his complaint."

Defendant relies upon the pleadings, and upon the following answers which it made to plaintiff's interrogatories.

"3 (a), (b) (d); 15 A- (a), (b); 16 (a); 17 (a), (b), (c), (d), (e), (f); 18 (a), (b), (c), (d), (e)."

This October 6, 1959.

s Hodges, Doughty & Carson,
Hodges, Doughty & Carson,
716-23 Hamilton Bank Building,
Knoxville, Tennessee.

Certificate of Service.

I certify that a true copy of the foregoing has been served upon counsel for all parties by delivering a copy to the office of the said counsel or by placing a copy in the United States Mail, addressed to counsel at his office, with sufficient postage thereon to carry the same to its destination. This 6th day of October, 1959.

Hodges, Doughty & Carson,
By: s J. H. Doughty.

ORDER.

(Filed October 26, 1959.)

This cause came on to be heard upon defendant's motion for judgment on the pleadings, and or in the alternative for partial summary judgment. The Court having considered said motion, doth overrule and disallow the same, without prejudice to the plaintiff, or the defendant, and with the right granted to defendant to renew said motion before the hearing in this cause.

Approved for Entry:

s Robt. L. Taylor,
O. K. Judge.

s Foster D. Arnett,
Attorney for Plaintiff.

s Hodges, Doughty & Carson,
Attorneys for Defendant.

MOTION FOR JUDGMENT ON THE PLEADINGS, AND OR FOR PARTIAL SUMMARY JUDGMENT.

(Filed November 12, 1959.)

Comes the defendant, The Finn Equipment Company, and pursuant to Rules 12 (c) and 56 (b), Federal Rules of Civil Procedure, and the Order of this Court entered on the 26th day of October, 1959, and moves the Court for a judgment on the pleadings, and or for a partial summary judgment, as follows:

> "That the Court find, adjudge, and declare, that plaintiff fails to state a claim upon which relief can be granted in 'Section VII', of his complaint."

Defendant relies upon the pleadings, and upon the following answers which it made to plaintiff's Interrogatories.

> "3 (a), (b), (c), 15 A (a), (b); 16 (a); 17 (a), (b), (c), (d), (e), (f); 18 (a), (b), (c), (d), (e)."

This November 11, 1959.

s J. H. Doughty,
J. H. Doughty,
715-23 Hamilton Bank Building,
Knoxville, Tennessee

Certificate of Service.

I certify that a true copy of the foregoing has been served upon counsel for all parties by delivering a copy to the office of the said counsel or by placing a copy in the United States Mail, addressed to counsel at his office, with sufficient postage thereon to carry the same to its destination. This 11th day of November, 1959.

Hodges, Doughty and Carson,
By: s J. H. Doughty

JUDGMENT.

(Filed December 1, 1959.)

This cause having been duly tried before the Court and a jury of good and lawful men and women duly sworn and impaneled to try the issues joined, to-wit: (Clerk here copy names of jurors) Mrs. Floyd Billingsley, Lewis S. Fordham, Vaughn L. York, Robert Whitt, Frank A. Nance, Homer Cannon, J. M. Murphy, Leuty D. McDonald, Sr., Mrs. Eula Puryear, Burl Price, Clarence Berry and Otto Kidd, who having duly rendered a verdict for the plaintiff John Tracy against the defendant The Finn Equipment Company, in the sum of $65,000.00, and the costs having been duly taxed against the defendant, The Finn Equipment Company. It Is Hereby Ordered, Adjudged and Decreed that the plaintiff, John Tracy, have and recover of the defendant, The Finn Equipment Company, the sum of $65,000.00 and the costs of the cause.

Dated: November 27, 1959.

Okay /s/ Robert L. Taylor,
Judge.

Zelenko & Elkind, Foster D. Arnett
and Jack B. Draper,

By /s/ Foster D. Arnett,
Attorneys for Plaintiff.

Hodges, Doughty & Carson,

By /s/ J. H. Doughty,
Attorneys for Defendant.

MOTION FOR JUDGMENT NON OBSTANTE VERE-DICTO, OR IN THE ALTERNATIVE FOR A NEW TRIAL.

(Filed December 4, 1959.)

Comes the defendant, by its Attorneys, and moves the Court for an Order setting aside the verdict of the Jury, and the judgment of the Court heretofore returned and entered of record in the above entitled action, and for judgment in accordance with its previous motion for a directed verdict, made at the conclusion of all of the evidence adduced in the trial of this cause, on the ground that the Court erred in denying the motion of the defendant to peremptorily instruct the Jury to return a verdict in favor of the defendant, because there was no evidence on which a verdict in favor of the plaintiff could be based.

In the alternative, and without waiving its foregoing motion, but expressly relying thereon, the defendant moves the Court to set aside the verdict of the jury and the judgment of the Court heretofore returned and entered of record herein, and grant a new trial in this action on the following grounds.

1. Because there is no evidence to sustain the verdict of the jury.

2. Because the evidence preponderates against the verdict of the jury, and in favor of the defendant.

3. Because the verdict of the jury is so excessive as to evince passion, prejudice and caprice.

4. Because the Court erred in failing to sustain defendant's motion for judgment on the pleadings, and or for partial summary judgment as follows:

> "That the Court find, adjudge and declare, that plaintiff fails to state a claim upon which relief can be granted in Section 'VII' of his complaint."

5. Because the Court failed and refused to withdraw from the jury's consideration plaintiff's theory as set forth in his complaint, that he was entitled to recover damages from the defendant by reason of an alleged breach of an implied warranty.

6. Because the Court erred in failing to sustain defendant's motion for an order requiring the plaintiff to join Royal Globe Insurance Company as a necessary additional party plaintiff.

7. Because the Court erred in sustaining plaintiff's objection to certain material evidence which defendant sought to introduce, i. e., a sound recording made by a qualified engineer which sufficed to show the different elevations of sound made by a Model G Finn mulching machine when being operated in its various phases.

8. Because the Court erred in instructing the jury as follows:

> ". . . if a remote user, such as the plaintiff sues a manufacturer for injuries sustained from the use of the machine he must allege and prove the existence of a latent defect or danger not known to the plaintiff or other users."

The Court erred in failing to supplement said instruction by adding the wording, "or discoverable by a reasonable inspection."

9. Because the Court erred in instructing the jury as follows:

> "On the other hand, the Court charges you that if you find that the machine possessed a latent defect or danger unknown to the plaintiff, and that the absence of guards or warning that the machine might start up when it was being cleared or cleaned caused the injury, then you must find for the plaintiff provided you

further find that plaintiff was not guilty of contributory negligence."

The Court erred in failing to supplement said instruction by adding the wording, "or discoverable by a reasonable inspection."

10. Because the Court erred in instructing the jury as follows:

> "The facts show that the defendant Company was an Ohio corporation and that the contract of sale was consummated in the State of Ohio. Any implied warranty of fitness must be governed by the law of that State since that was the State where the contract of sale was entered into."

The Court erred in instructing the jury that the law of Ohio controlled respecting the plaintiff's claim that he was entitled to recover damages in consequence of an alleged breach of an implied warranty.

11. Because the Court erred in instructing the jury as follows:

> "A warranty is in the nature of a promise upon which another party relies. In this case the warranty, if any, arose at the time the plaintiff's employer acquired the mulching machine from the defendant. Ordinarily, a warranty creates a contractual relationship which exists only between the seller and the purchaser. However, under the law of the State of Ohio, which controls this phase of the case, this limitation has been expanded to cover other persons than the purchaser."

The Court erred in instructing the jury that the law of Ohio controlled respecting the plaintiff's claim that he was entitled to recover damages in consequence of an alleged breach of an implied warranty, and that privity was unnecessary.

12. The Court erred in instructing the jury as follows:

> "If the jury finds that a warranty of fitness is implied from all the facts then under the law of Ohio that warranty would run to an employee of the purchaser, and it is admitted in this record that the plaintiff was an employee of the purchaser at the time he sustained his accidental injury."

The Court erred in that, under the law of Ohio, privity must exist before a claim for damage may be asserted for an alleged breach of an implied warranty.

13. Because the Court erred in instructing the jury as follows:

> "The Court charges you as requested by the plaintiff in part, that if you find from the proof that the negligence of Mr. Corado—that is the man who lives either in New Jersey or New York and who was working on the machine at the time of plaintiff's injury—I say, the Court charges you that if you find from the proof the negligence of Corado, the fellow servant of plaintiff, and the negligence of the Finn Equipment Company in building a machine which contained a latent defect concurrently and proximately caused the accident and the resulting injuries to plaintiff, and that plaintiff was free from contributory negligence, your verdict would be in favor of the plaintiff."

The Court erred in failing to supplement this charge by charging the doctrine of intervening efficient cause,—the Court stating when refusing that the doctrine did not apply in the State of New York.

14. The Court erred in instructing the jury as follows:

> "The Court charges you as requested by the plaintiff, that should you find that the defendant, The Finn Equipment Company, was guilty of negligence in the design of the mulching machine in that it failed to

exercise reasonable care to eliminate or guard against a hidden or concealed danger in the machine, the fact that the negligence of some third person concurred with the negligence of the Finn Equipment Company to produce the plaintiff's injury does not relieve the Finn Equipment Company of liability for its negligence, if the Finn Equipment Company's negligence was the proximate cause of the accident and the resulting injuries to plaintiff."

The Court erred in failing to supplement this charge by charging the doctrine of intervening efficient cause, the Court stating when refusing that the doctrine did not apply in the State of New York.

15. The Court erred in instructing the jury as follows:

"The jury may find for the plaintiff on the question of negligence or on the question of implied warranty or upon both."

The Court erred in instructing the jury that it could find for the plaintiff for an alleged breach of implied warranty.

16. The Court erred in instructing the jury as follows:

"Where a plaintiff has been injured by the negligent conduct of another, or from the breach of an implied warranty, such amount should be awarded in damages as will fairly compensate plaintiff . . ."

The Court erred in instructing the jury that it could find for the plaintiff for an alleged breach of implied warranty.

17. The Court erred in instructing the jury as follows:

"The Court: Ladies and gentlemen of the jury, Section 1315.16 of the Ohio law relating to sales in which warranty is implied reads as follows: . . . and

keep in mind that the Ohio law controls on this phase of the litigation.

"Subject to sections 1315.01 to 1315.76, inclusive, of the Revised Code and any law applicable thereto, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:

"(A) When the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he is the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose.

"(B) When the goods are bought by description from a seller who deals in goods of that description, whether he is the grower or manufacturer or not, there is an implied warranty that the goods shall be of merchantable quality.

"(C) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.

"(D) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

"(E) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

"(F) An express warranty or condition does not negative a warranty or condition implied under such sections unless inconsistent therewith."

The Court erred in instructing the jury as to the statutory law of Ohio respecting implied warranties in that

the law of Ohio was not applicable, and or there was no privity between the parties plaintiff and defendant.

18. Because the Court erred in declining to give in charge to the jury defendant's special request No. 2, submitted before the conclusion of the evidence, which special request was as follows:

> "I charge you that if you should find from the evidence that the defendant failed and omitted to provide any guards, or inter-locking devices that would prevent the plaintiff, John Tracy from coming in contact with the revolving blades within the machine, or failed to provide a stopping device, by means of which the blades would stop upon the clean-out door being opened, that then, or in either event, this would not suffice to warrant a judgment in favor of the plaintiff, and against the defendant."

The foregoing special request contained an accurate statement of law, which was not given in charge by the Court to the jury.

19. Because the Court erred in declining to give in charge to the jury defendant's special request No. 5, submitted before the conclusion of the evidence, which special request was as follows:

> "I charge you that the defendant, The Finn Equipment Company owed only that duty to design and construct this machine so that it did not have therein a hidden or latent defect. If the condition in the machine were known, or as stated in law, 'patent' or discoverable by a reasonable inspection then a person injured by said machine may not assert a claim for damages."

The foregoing special request contained an accurate statement of law, which was not given in charge by the Court to the jury.

20. Because the Court erred in declining to give in charge to the jury defendant's special request No. 8, submitted before the conclusion of the evidence, which special request was as follows:

> "I charge you that if you should find that the defendant was negligent in its design, or manufacture of the machine in question, but that Meadow Brook Nurseries, Inc., failed to properly instruct John Tracy, or inform him as to the proper mode of operating the machine, and that this was a negligent act, but for which the accident would not have happened, such failure upon the part of Meadow Brook Nurseries, Inc., would be an intervening, efficient cause of the accident, which would insulate the defendant from liability, and your judgment would be for the defendant."

The foregoing special request contained an accurate statement of law, which was not given in charge by the Court to the jury.

21. Because the Court erred in declining to give in charge to the jury defendant's special request No. 9, submitted before the conclusion of the evidence, which special request was as follows:

> "I charge you that if you should find that the defendant was negligent in its design, or manufacture of the machine in question, but that a fellow employee of the plaintiff, failed to take the machine out of gear when the plaintiff was attempting to unclog the machine, or failed to advise plaintiff that the machine was still in gear, and such act on the part of the fellow employee was a negligent act, which proximately caused plaintiff's injury, such negligence upon the part of the fellow employee, would be an intervening, efficient cause of the accident, which would insulate the defendant from liability, and your judgment would be for the defendant."

The foregoing special request contained an accurate statement of law, which was not given in charge by the Court to the jury.

22. Because the Court erred in declining to give in charge to the jury defendant's special request No. 10, submitted before the conclusion of the evidence, which special request was as follows:

> "I charge you that if the plaintiff was guilty of negligence, be the same ever so slight, which proximately caused or contributed to the accident, he may not recover."

The foregoing special request contained an accurate statement of law which was not given in charge by the Court to the jury.

23. Because the Court erred in declining to give in charge to the jury defendant's special request No. 11, submitted before the conclusion of the evidence, which special request was as follows:

> "I charge you that the plaintiff may not rely upon an alleged breach of an implied warranty, in and for the reason that there was no privity of contract between the plaintiff and the defendant."

The foregoing special request contained an accurate statement of law, which was not given in charge by the Court to the jury.

24. Because the Court erred in declining to give in charge to the jury defendant's special request No. 13, submitted before the conclusion of the evidence, which special request was as follows:

> "I charge you that since the Finn Mulch Spreader was sold under its patent or trade name, there is no

implied warranty as to its fitness to any particular purpose, and hence the plaintiff may not rely upon an alleged breach of an implied warranty."

The foregoing special request contained an accurate statement of law, which was not given in charge by the Court to the jury.

25. Because the Court erred in declining to give in charge to the jury defendant's special request No. 14, submitted before the conclusion of the evidence, which special request was as follows:

> "I charge you that the plaintiff may not recover against the defendant merely because he has sustained accidental injuries while using a machine manufactured by the defendant. Before the defendant may be held liable, you must find from a preponderance of the evidence that the defendant knew or should have known that its Model G Finn Mulch spreader contained hidden, or latent defects which could not be ascertained upon a reasonable inspection."

The foregoing special request contained an accurate statement of law, which was not given in charge by the Court to the jury.

26. Because the Court erred in declining to give in charge to the jury defendant's special request No. 15, submitted before the conclusion of the evidence, which special request was as follows:

> "I charge you that the plaintiff would not be entitled to recover damages from the defendant because of the failure of the defendant to place a sign, or warning upon its machine, if and providing the plaintiff knew, prior to the time of his injury, of the danger which allegedly should be warned against."

The foregoing special request contained an accurate statement of law, which was not given in charge by the Court to the jury.

The Finn Equipment Company,

By: Hodges, Doughty and Carson,

s Hodges, Doughty & Carson,

Attorneys for Defendant.

Certificate of Service.

I certify that a true copy of the foregoing has been served upon counsel for all parties by delivering a copy to the offices of said counsel or by placing a copy in the United States Mail, addressed to counsel at his office, with sufficient postage thereon to carry the same to its destination. This 4 day of December, 1959.

Hodges, Doughty & Carson,

By s J. H. Doughty.

MEMORANDUM.

(Filed December 28, 1959.)

Defendant has filed a motion for judgment non obstante veredicto, or in the alternative for a new trial, and has urged twenty-six separate grounds in its support.

Grounds 1, 2 and 3 relate to the evidence upon which the jury based its verdict. A short reply to these grounds is that, in the opinion of the Court, the evidence presented factual issues for the determination of the jury and that there is substantial evidence to support the verdict of the jury. Grounds 1, 2 and 3 are, therefore, overruled.

Grounds 4 and 5 relate to the implied warranty question which will be discussed later in this memorandum.

Ground 6 raises the question that the Court erred in not requiring plaintiff to join Royal Globe Insurance Company

as a necessary additional party plaintiff. In the opinion of the Court this ground is without merit and is overruled.

Ground 7 asserts that the Court erred in not receiving the proffered testimony of a witness which consisted of an experiment conducted with a sound tape recording machine out of the presence of the jury. The experiment was not conducted under similar conditions or circumstances to those existing in the case that was on trial and in the opinion of the Court the ruling was correct. American Jurisprudence, Vol. 20, Evidence, Sec. 756, page 628. **Byers v. Railroad and Aliston v. Railroad**, 94 Tenn. 344, 353, 354.

Grounds 8 and 9 complain of certain portions of the charge relating to a latent defect. The charge, when read as a whole, properly charged the law of New York relating to latent defects and defendant's complaints relative thereto are without merit. Grounds 8 and 9 are, therefore, overruled.

Grounds 10, 11, 12, 15, 16 and 17 complain of portions of the charge relating to the subject of implied warranty and will be discussed hereafter.

Grounds 13 and 14 complain of the action of the Court in failing to charge on the question of intervening cause immediately following the portions of the charge which are quoted in those grounds. Grounds 20 and 21 complain of the Court's action in refusing to give the requested charges of the defendant which are quoted under these grounds. The requested charges dealt with the subject of intervening cause. The Court charged at length on the subject of proximate cause in relation to foreseeability and intervening cause. See page 13, Court Reporter's Transcript (Court's Charge, Appendix p. 137a). The Court was at that time and still is of the opinion that the charge was proper and sufficient. Grounds 13, 14, 20 and 21 are, therefore overruled.

Ground 18 complains of the Court's action in failing to charge defendant's special request No. 2, which is copied in the motion. This ground is lacking in merit and is overruled.

Ground 19 complains of this Court's action in refusing to give defendant's special request No. 5. This ground, also, is lacking in merit and is overruled.

Ground 22 complains of the action of the Court in failing to charge defendant's special request No. 10. The subject matter contained in this request was covered in the general charge. Ground 22 is overruled.

Ground 23 complains of a portion of the charge that deals with the implied warranty question, and will be discussed later.

Ground 24 complains of the action of the Court in failing to charge as requested by defendant on the implied warranty phase of the case. This ground will be discussed hereafter.

Grounds 25 and 26 complain of the action of the Court in refusing to charge defendant's special requests Nos. 14 and 15. These grounds are without merit and are overruled.

As previously indicated, grounds 4, 5, 10, 11, 12, 15, 16, 17, 23 and 24 relate to the question of implied warranty. It was the theory of the defendant that there was no implied warranty of fitness and if there had been such an implied warranty it would not have enured to the benefit of the plaintiff under the Ohio law because there was no privity between plaintiff, who was not a purchaser but only a user, and the defendant, the manufacturer.

Defendant insisted that the New York law would control the rights of the parties if any implied warranty existed and that under the law of New York an implied

warranty would not enure to the benefit of plaintiff because of lack of privity. The Court ruled that the law of Ohio governed the contractual rights of the parties as Ohio was the place where the contract was made. The Court is still of the opinion that the law of Ohio controls the contractual rights of the parties, but after a further examination of Baldwin's Ohio Revised Code, Sec. 1315.16 (a) through (f) and pertinent decisions of the Appellate Courts of Ohio which have been brought to the Court's attention by both parties, the Court has reached the conclusion that an implied warranty as to fitness runs only to the buyer or purchaser and not to one who is simply a user.

The Court had some misgiving about its ruling on the implied warranty feature of the case at the time the ruling was made and so indicated to counsel for plaintiff. The Court felt that if it made a mistake in ruling in favor of the plaintiff it could be corrected on a motion for a new trial, while if its ruling were against the plaintiff, there might not be another opportunity to correct it.

In **Rogers v. Toni Home Permanent Company**, 147 N. E. (2) 614 (Supreme Court of Ohio, January 29, 1958), suit was brought against the manufacturer of a home permanent set by the ultimate consumer, who purchased the product from a retailer in reliance upon inducements of the manufacturer and later suffered harm from its use by reason of deleterious ingredients.

The Supreme Court of Ohio in its Syllabus 3, which was prepared by the Court and incorporates its decision ruled:

> "Under modern merchandising practices, where the manufacturer of a product in his advertising makes representations as to the quality and merit of his product aimed directly at the ultimate consumer and urges the latter to purchase the product from a re-

> tailer, and such ultimate consumer does so in reliance on and pursuant to the inducements of the manufacturer and suffers harm in the use of such product by reason of deleterious ingredients therein, such ultimate consumer may maintain an action for damages immediately against the manufacturer on the basis of express warranty, notwithstanding that there is no direct contractual relationship between them."

It will be noted that the ultimate consumer or user in this case was the **purchaser** to whom the Court said the warranty ran. This case is not authority that a warranty runs to one who was not a purchaser or buyer. **Markovich v. McKesson and Robbins, Inc.**, 149 N. E. (2) 181 (Court of Appeals of Ohio), and decided April 2, 1958, was the same kind of case in which the plaintiff purchased and used a home permanent set. The Court noted:

> "The ultimate buyer would not have become a purchaser of the subject of the sale had it not been for the representations of the manufacturer or producer made to the ultimate purchaser to induce his use of the product. If such representations are such (as requiring a purchase by description or for a particular purpose), the law would imply a warranty under the circumstances and such implied warranty becomes an obligation of the manufacturer or producer inducing the purchase."

Again the plaintiff was the ultimate buyer who was induced by the representations of the manufacturer to become a purchaser and user of the product.

A case more nearly in point is **Steele, Admrx. v. Westinghouse Electric Corp.**, 159 N. E. (2) 469 (Court of Appeals of Ohio, January 30, 1958) which was decided after the Rogers case but several months before the decision in the Markovich case. The decedent, who was electrocuted while using a milk cooler, was apparently an em-

ployee of his landlord who had purchased the cooler from defendant. Suit was brought not by the landlord but by the administratrix of the decedent. The Court said in the course of its opinion: "There is no privity of contract between the defendant manufacturer or her decedent, so that the cause of action must rest upon alleged negligence of the defendant manufacturers."

This series of cases leads this Court to the conclusion that the Ohio Courts have gone no further than to hold that a warranty runs only to a remote buyer where there is an absence of privity. The Court of Appeals of Ohio had before it the ultimate user question in the Steele case and the remote purchaser question in the Markovich case and the decisions establish a clear distinction. The Steele case confirms our conclusion that a remote user who is not also a purchaser is not protected by a manufacturer's warranty. Nothing in Sec. 1315.16 of the Ohio Revised Code changes this conclusion. The buyer or purchaser is protected under that Act and under Sec. 1315.14 —not the user or consumer who is not a buyer. That the remote user may have had a remedy in tort does not correct the error in charging the jury that he also had a cause of action under an implied warranty.

The Court is of the opinion that it erred in charging that a warranty of fitness runs to the employee of the purchaser, or to other persons than the purchaser.

A separate order has been passed to the Clerk denying defendant's motion for a judgment notwithstanding the verdict of the jury, and granting its motion for a new trial.

Should a date become available during this term of Court, the Clerk is directed to set this case for retrial after giving due notice to the interested parties.

/s/ Robt. L. Taylor,
United States District Judge.

ORDER.

(Filed December 28, 1959.)

For the reasons indicated in a memorandum this day passed to the Clerk, it is Ordered that defendant's motion for a judgment notwithstanding the verdict of the jury be, and same hereby is, denied, but that defendant's motion for a new trial be, and same hereby is, granted.

Enter:

s Robt. L. Taylor,
United States District Judge.

ORDER.

(Filed January 5, 1960.)

Upon a consideration of plaintiff's Motion in the Alternative seeking, among other things, pursuant to Sec. 1292 (b), Title 28, U. S. C. A., a modification of the Court's order setting aside the general verdict of the jury and granting to the defendant a new trial, the Court is of the opinion that plaintiff's motion in this respect is proper and should be sustained.

It is, therefore, Ordered that the Court's order entered on the 28th day of December, 1959, setting aside the general verdict of the jury for the plaintiff and granting to the defendant a new trial, be and the same is hereby modified and supplemented in the following particulars:

By adding the following language as a second paragraph to such order:

> "In entering this order the Court further expressly finds and therefore states that this order setting aside the general verdict of the jury and granting to the defendant a new trial involves controlling questions of law as to which there are substantial grounds for difference of opinion and that an immediate appeal from

this order, pursuant to the provisions of Sec. 1292 (b), Title 28, U. S. C. A., as amended, may materially advance the ultimate termination of the litigation, and this Court strongly favors the immediate determination of such controlling questions of law by the United States Court of Appeals, Sixth Circuit.

"Pending further action by the United States Court of Appeals, Sixth Circuit, it is Ordered that all proceedings in this Court be and they are hereby stayed."

Enter:

/s/ Robt. L. Taylor,
Judge.

nko & Elkind, and
oster D. Arnett and
ick B. Draper,

By /s/ Foster D. Arnett,
Of Counsel for Plaintiff.

lges, Doughty & Carson,

By /s/ J. H. Doughty,
Of Counsel for Defendant.

ORDER.

(Filed February 3, 1960.)

ore: Miller, Cecil and Weick, Circuit Judges.

his action came on at this term of court upon the mo- n of the plaintiff for an order pursuant to Sec. 1292 (b), le 28, U. S. C., granting leave to the plaintiff to appeal m an order of the United States District Court for the stern District of Tennessee, Northern Division, Judge bert L. Taylor, entered in this action on January 5, 1960, titled "Order", modifying the Court's Order of Decem- r 28, 1959, granting defendant a new trial in this action,

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The United States District Court for the Eastern District of Tennessee, Judge Robert L. Taylor, having certified that its aforesaid order dated January 5, 1960, involves controlling questions of law as to which there are substantial grounds for difference of opinion and that an immediate appeal from said Order may materially advance the ultimate determination of this litigation, and

This Court having reviewed the relevant pleadings and proceedings in the action and on consideration thereof it is hereby

Ordered: 1. That the plaintiff be, and hereby is, granted leave under the provisions of Sec. 1292 (b), Title 28, U. S. C., to appeal to this Court from the Order of the United States District Court for the Eastern District of Tennessee, Northern Division, Judge Robert L. Taylor, dated January 5, 1960, entitled "Order", modifying the District Court's Order entered December 28, 1959, granting to defendant a new trial in this action.

Approved for Entry:

s Paul C. Weick,
United States Circuit Judge.

CHARGE OF DISTRICT COURT.

(2) The Court: Ladies and gentlemen of the jury, this is a suit to recover damages for personal injuries which resulted in the loss of an arm, and which were sustained by plaintiff while using a Model G Finn Mulching Machine manufactured by the defendant, the Finn Equipment Company.

The plaintiff claims that the machine was negligently designed and constructed so as to contain a hidden or concealed danger of which plaintiff had no actual or constructive knowledge; that the defendant manufacturer foresaw or should have foreseen, that in its normal and usual opera-

tion the Model G Finn Mulching Machine would frequently become clogged necessitating a manual clearing of the blower fan; and, that there was no way for a laborer on this crew-operated machine, who was cleaning or clearing the blower fan, to know whether the blower fan was disengaged prior to the cleaning operation and that this inability to know endangered the laborer and was the result of defendant's negligent and careless design of the machine or of its failure to warn the plaintiff of the danger about which it had superior knowledge.

The plaintiff further sues the defendant for a breach of implied warranty of safety of the machine for the use to which it was to be put; that the Model G Finn Mulching Machine was not safe and suitable for the use intended and that therefore the defendant breached an (3) implied warranty to plaintiff in this respect. The Court instructs you that plaintiff concedes there is no evidence of an express warranty and you will find there was no express warranty in the sale of the machine.

The defendant denies that plaintiff's injuries stem from its failure to exercise due care in the design, engineering and manufacture of its Model G Finn Mulching Machine. It claims that the blower fan blades were an integral part of the mulch spreader and were observable to the plaintiff on reasonable inspection and contained no concealed or latent danger not observable by the plaintiff.

Defendant further claims that it had not notice or knowledge of any hazard or hidden danger about the blower fan blades of its mulch spreader, and that the machine was adequately designed for the purpose and use for which it was intended and contained no hidden or latent defects. Defendant denies that it was guilty of any negligence which resulted in plaintiff's injuries, and charges that plaintiff was guilty of negligence which proximately caused his injuries. Defendant denies that it made any warranties either express or implied, to the plaintiff.

The parties agree that since the accident occurred in the State of New York that the law of the State of New York governs the negligence phase of the case. That is the law and the Court so charges you that the law of New (4) York governs the negligence phase of this case.

The Court further charges you that under the law of the State of New York the manufacturer of a machine, which is dangerous because of the way it functions, owes to those who use it a duty merely to make it free from latent defects and concealed dangers and that if a remote user, such as the plaintiff, sues a manufacturer for injuries sustained from the use of the machine he must allege and prove the existence of a latent defect or danger not known to the plaintiff or other users.

To constitute a "latent defect" the defect must be hidden from the knowledge as well as from the sight and must be one which could not be discovered by the exercise of ordinary and reasonable care.

A patent defect is one that is not hidden from the eye or mind but is one that is evident or obvious or manifest.

If you find that the defendant did everything necessary to make the machine function properly for the purpose for which it was designed and if you find that the machine was without any latent defect or hidden danger and that its operation created no danger or peril not known to the user, then the defendant has satisfied the law's demands and you must find for the defendant. If you find that the negligence of Corado—that is the man who testi- (5) fied from New York or New Jersey—was the sole cause of the accident, the defendant would not be liable.

On the other hand, the Court charges you that if you find that the machine possessed a latent defect or danger unknown to the plaintiff and that the absence of guards or warnings that the machine might start up when it was being cleared or cleaned caused the injury, then you must find for the plaintiff provided you further find that plaintiff

was not guilty of contributory negligence. But the Court charges you that the manufacturer is under no duty to guard against injury from an obvious peril or from a source manifestly dangerous. The manufacturer has the right to expect persons using such machines to avoid dangers which are obvious and patent to all.

Liability is imposed upon the manufacturer if the defect or danger is not known or is not obvious or discoverable by a reasonable inspection. The manufacturer is not required to make a perfect machine nor to foresee and guard against careless, ignorant or incompetent misuse. He is only liable if he has failed to exercise reasonable care in the adoption of a design which contains no hidden defects or dangers.

If you find that this plaintiff was experienced in the operation of this mulching machine and had equal knowledge and means of obtaining knowledge of the dangers (6) inherent in the cleaning of the blower fan as had the manufacturer, then there can be no recovery.

The facts show that the defendant company was an Ohio corporation and that the contract of sale was consummated in the State of Ohio. Any implied warranty of fitness must be governed by the law of that State since that was the State where the contract of sale was entered into.

Plaintiff claims that there was an implied warranty by the manufacturer of the fitness of the machine for the uses for which it was sold.

A warranty is in the nature of a promise upon which another party relies. In this case the warranty, if any, arose at the time the plaintiff's employer acquired the mulching machine from the defendant. Ordinarily, a warranty creates a contractual relationship which exists only between the seller and the purchaser. However, under the law of the State of Ohio, which controls this phase of the case, this limitation has been expanded to cover other persons than the purchaser.

Whether or not there is an implied warranty is a question of fact for you, the jury, to determine. The jury must determine whether an implied warranty existed. The jury must rely upon the circumstances of the sale, opportunities for examination of the product sold and other (7) surroanding factor in determining whether there was or was not an implied warranty.

If the jury finds that a warranty of fitness is implied from all the facts then under the law of Ohio that warranty would run to an employee of the purchaser, and it is admitted in this record that the plaintiff was an employee of the purchaser at the time he sustained his accidental injury. The jury must be the judge of the extent of the warranty. That is, what was warrantied or guaranteed. If the jury finds from the facts that there was no warranty or if there was a warranty but that it did not cover the situation in this lawsuit, then there can be no recovery on the implied warranty theory.

Before it can be found that a warranty exists it must be found from the circumstances that the person charged with having warranted something, implied an unmistakable fact. For example, "I guarantee that such a fact is true, and if it is not true I will make up to you in damages the loss sustained as a proximate result of it not being true." That is the meaning of warranty and unless that meaning can be found from all the circumstances existing between the seller and the purchaser at and immediately prior to the purchase and sale of the machine on which plaintiff was working at the time of his accidental injury, no warranty can exist.

(8) Ladies and gentlemen of the jury, you are the sole and exclusive judges of the testimony and of the weight and credibility you will give to the swearing of the witnesses, and in weighing the evidence you will look to the demeanor and manner of the witness while he was on the witness stand, to his intelligence or lack of intelligence, to any bias or prejudice or feeling that may be manifested, any rela-

tionship to any of the parties in the case, his interest in the outcome of the lawsuit, his means of knowledge of the facts about which he testifies, the reasonableness or unreasonableness of the story that he tells. All of those things you will take into consideration in weighing the testimony, and you will give greater weight to that witness or those witnesses who, in your opinion, have more truthfully detailed the facts of the case.

Two or more persons have testified in this case as experts. They were offered by the respective parties as experts. The Court charges you that an expert witness is one who possesses special or technical knowledge or skill upon the subject about which he testifies, that is, upon a subject with which ordinary men and women are not familiar. He differs from the ordinary witness in that he is permitted to express opinions as to the results of proven facts, although he may also testify as to facts themselves (9) as any other witness.

Expert opinions are not to be accepted as facts. Those opinions should be carefully weighed by the jury, with regard to the expert's training, experience, and sources of knowledge, as well as with regard to his prejudices, if any appear.

Expert witnesses are frequently paid special compensation by the party for whom they testify. Such compensation is entirely proper. Yet, because of it the jury should receive the expert's testimony with caution and weigh it carefully.

A person who begins a lawsuit is known as the plaintiff. The plaintiff always seeks some kind of relief against the other party, called the defendant.

In the usual case based upon negligence, and one phase of this case is based on negligence, the plaintiff alleges that the defendant in some manner was at fault and in consequence injured plaintiff, either through his person or his property. In order to be entitled to the relief he seeks, the

plaintiff is required to prove that the defendant wrongfully injured him. It is therefore said that the burden of proof is upon the plaintiff. This broad, general burden continues upon the plaintiff, and he must maintain it in order to be entitled to a verdict.

However, as to particular matters, there may be a (10) burden also upon the defendant. This is true where the defendant asserts some affirmative defense against liability, such as contributory negligence, and that is one of the defenses asserted by the defendant in this case. The burden of establishing and maintaining such affirmative matter rests upon the defendant. It is not in every case that the defendant relies upon special affirmative matter of defense. Sometimes he merely denies that he was at fault and confines his evidence to proof of that denial. In such event the burden is not upon the defendant to prove that he was not at fault; it continues to rest upon the plaintiff to prove that the defendant was at fault and that because of defendant's wrongful conduct plaintiff sustained an injury.

Burden of proof and preponderance of evidence ordinarily have reference to direct and indirect evidence or circumstantial evidence. Direct evidence is that contained in the testimony of a witness to a fact, the knowledge of which the witness acquired through his own senses. Indirect evidence is that knowledge which is inferred from known facts. It is not permissible to draw an inference from another inference. However, it is permissible to draw reasonable inferences from proven facts.

Sometimes direct evidence falls short of proving the final or all-important fact which a party seeks to (11) prove. However, it is sometimes possible to prove facts of such significant or related character that the final or conclusive fact can readily be inferred from what has been proved. This is what is meant by proving a case by circumstantial evidence.

Where the burden of proof rests upon a particular party, he is required to prove his claim by a preponderance of the

evidence. A preponderance means, merely, the greater weight of the evidence. A plaintiff, who is required to make out his case substantially as alleged, must meet his obligation with the greater weight of the evidence. The balance must be tipped in his favor. If the evidence swings the balance more heavily on the defendant's side, the plaintiff must fail. Also, if the evidence is in a state of even balance, the plaintiff must fail, because in that event the parties are in the situation they had before they started or the suit was instituted.

Negligence is defined as the failure of a person to exercise ordinary care with respect to himself or to another to whom is owed a duty of ordinary care. Ordinary care is defined as such care as an ordinary prudent person would exercise in the situation under consideration. Where one owes a duty of care towards himself or another, violation of that duty is negligence.

Ordinary care is a variable term. Conduct that (12) might be considered careful in one situation might not be so considered in every situation. Hence, ordinary care is that degree of care that is commensurate with the degree of danger to which the actor is exposed or to which another is exposed by his conduct. For the greater the danger the actor or another is in, the greater the care an ordinary prudent person would exercise to avoid injury to himself or to the other.

Negligence standing alone has no legal significance. It becomes significant when a negligent person causes injury to another. Negligence becomes the basis of legal liability when it is the proximate cause of the injury.

The proximate cause of an injury or of an accident, is that act or omission of duty which proximately and immediately caused the accident, or that omission of duty which failed to prevent it and without which the accident would not have occurred. In daily human relations, a citizen is under a duty to exercise ordinary care to avoid in-

juring his fellow citizen. If he negligently violates that duty, either by a positive negligent act or by a negligent failure to act when the duty requires action, and the violation of duty is the proximate cause of injury to another, he is liable in damages for the injury so caused.

(13) Considered in connection with the subject of proximate cause are the questions of foreseeability and intervening cause.

A person cannot be required absolutely to foresee events that may occur, but from a legal viewpoint foreseeability may be charged against a person whether he actually foresaw the event or not. This subject is pertinent where a defendant has been negligent and a plaintiff has sustained injury as a result of the negligence. If the accident is one previously unheard of and unknown to human experience, lack of foreseeability may reasonably be found to have been the case.

But for foreseeability to exist, it is not required that the exact event or injury be anticipated. It is sufficient in order to establish liability for negligence, if an ordinary prudent person would have foreseen that some person in some manner would be injured by reason of the negligence.

An absolute lack of foreseeability has the effect of making cause remote and is a doctrine applied ordinarily to passive situations, or negligent acts of omission. But causation is not made remote if an ordinary prudent person would have foreseen that somebody would be hurt, not necessarily the plaintiff, but anybody, as a result of the defendant's negligence.

(14) The law recognizes certain exceptions to the rule of liability for negligence. One exception is that of contributory negligence. Contributory negligence is that negligence on the part of the plaintiff. It is contributory if it is a proximate cause of the accident. Where a plaintiff by his own negligence caused or contributed proximately to cause

the accident and his injuries, such plaintiff is not entitled to a verdict. The legal reason therefor is, that a person who has injured himself should not be permitted to cast the burden of his own wrong upon another person when by the exercise of ordinary care he could, despite the other's negligence, have avoided the injury.

The Court charges you at the request of the defendant, that under the statutes of Ohio if the plaintiff saw, or had an opportunity to inspect, or examine, the Finn Mulch Spreader, prior to his injury, he may not rely upon an alleged breach of an implied warranty, respecting any alleged defects in the machine, which his examination ought to have revealed.

The Court charges you as requested by the plaintiff in part, that if you find from the proof that the negligence of Mr. Corado—that is the man who lives either in New Jersey or New York and who was working on the machine at the time of plaintiff's injury—I say, the (15) Court charges you that if you find from the proof the negligence of Corado, a fellow servant of plaintiff, and the negligence of the Finn Equipment Company in building a machine which contained a latent defect concurrently and proximately caused the accident and the resulting injuries to plaintiff, and that plaintiff was free from contributory negligence, your verdict would be in favor of the plaintiff.

The Court charges you as requested by the defendant, that if a manufacturer does everything necessary to make a machine function properly for the purposes for which it is designed, if the machine is without any latent defect, and if its functioning creates no danger or peril that is not known to the user, then the manufacturer has satisfied the law's demand and an injured plaintiff may not recover. We have not as yet reached the state where a manufacturer is under the duty of making a machine accident proof.

The Court charges you as requested by the plaintiff, that should you find that the defendant, The Finn Equipment

Company, was guilty of negligence in the design of the mulching machine in that it failed to exercise reasonable care to eliminate or guard against a hidden or concealed danger in the machine, the fact that the negligence of some third person concurred with the (16) negligence of the Finn Equipment Company to produce the plaintiff's injury does not relieve the Finn Equipment Company of liability for its negligence, if the Finn Equipment Company's negligence was the proximate cause of the accident and the resulting injuries to plaintiff.

The jury may find for the plaintiff on the question of negligence or on the question of implied warranty or upon both. It may find for the defendant on both the question of negligence and on the question of implied warranty or it may find for the defendant upon one or the other. If it finds for the defendant on both phases of the lawsuit, then that ends the case insofar as this jury is concerned.

A verdict for the plaintiff, that is, if the jury finds for the plaintiff either on the negligence theory or the latent defect theory or the implied warranty theory, then the jury must go further and make an award of damages.

Plaintiff, John Tracy, is suing for $125,000.00 damages, and alleges that his left forearm and hand were severely crushed and torn, that it was necessary surgically to amputate his hand and his arm. He claims, in addition, damages for extreme pain and discomfort and emotional shock and distress. He also claims costs of his hospitalization, surgery and the cost of the prosthetic device to be (17) fitted to the stump of his arm. All of these items it is admitted, or stipulated, amount to date to the sum of $4,670.00. Plaintiff also claims damages for permanent partial disability and the reduction in his income expectancy and his ability to earn a living for himself and his wife and his children. He also claims damages for loss of wages in the past and for loss of wages in the future.

The Court charges you that it is not permissible to award more than the amount sued for. It is permissible to award

less. Where a plaintiff has been injured by the negligent conduct of another, or from the breach of an implied warranty, such amount should be awarded in damages as will fairly compensate plaintiff for the injuries, suffering, hospital and medical expenses, loss of past and future wages, and all losses sustained as a direct and proximate result of the fault of the defendant. However, before an award or damages can be allowed for future losses of wages, it must appear with reasonable certainty from the proof that plaintiff will sustain as a proximate and direct result of his accidental injury losses in the future.

The jury may retire temporarily.

(Whereupon the jury was excused from the courtroom, and the following proceedings were (18) had in the absence of the jury.)

The Court: Does the plaintiff have any objection to any part of this charge?

Mr. Arnett: May it please the Court, we do. I think that the Court inadvertently gave the definition of express warranty rather than implied warranty, because the Court said something to the effect about a guarantee or a virtual guarantee. I cannot recall the exact words that were used.

We respectfully insist that is the definition that would be given to an express warranty situation. As your Honor knows, that is no longer in this lawsuit.

The Court: Well, isn't that what an implied warranty is, that it will be fit? "I guarantee that this machine"—applied to this case—"is fit for the purpose. That is, for the use, fit for the use to which it is to be put."

Mr. Arnett: But your Honor had some language in there which I respectfully suggest is really, in substance, express rather than implied warranty.

The Court: Here is what I charged, and I am satisfied with it.

Before it can be found that a warranty exists it must be found from the circumstances that the (19) person, charged

with having warranted something, implied an unmistakable fact. "I guarantee that such a fact is true, and that if it is not true I will make up to you in damages the loss you sustain as a proximate result of its not being true." That is the meaning of warranty and unless that meaning can be found from all circumstances existing between the seller and purchaser at or immediately prior to the date of the purchase and sale no warranty can exist.

Mr. Draper: We are not trying to belabor this matter, but we feel because the State of Ohio has adopted a uniform sales act, and we think that under certain portions of that uniform sales act, if certain facts are proven there is a warranty implied by law.

In other words, you don't have to come out and say "I guarantee". The law says there is an implied warranty.

The Court: But that is what they implied, that it is fit for use.

Mr. Arnett: We feel like the jury might possibly misunderstand in order to have an implied— —

The Court: This is the Ohio Act, and— —

Mr. Arnett: I believe Mr. Doughty has cited it (20) to the Court in the brief.

The Court: If you have the wording of the Act, let me look at it.

Mr. Arnett: It is in one of the briefs cited by Mr. Doughty.

The Court: Do you have a copy, Mr. Doughty?

Mr. Draper: May I approach the Bench? This is a copy of his brief in which he cites that.

(Counsel has a discussion at the Bench with the Court.)

The Court: Do you have any objection to any part of this charge?

Mr. Arnett: May I have a minute, if the Court please?

The Court: Yes. Do you have any objection now to this charge, any part of it, this plaintiff?

Mr. Arnett: Not at this time do I understand there is any.

The Court: It won't do you any good to have any later on.

Mr. Arnett: I understand that.

The Court: Do you have any special requests other than those you have made?

Mr. Arnett: I don't think so.

The Court: Does the defendant have any objec- (21) tion to any part of the charge?

Mr. Doughty: Yes, your Honor. We respectfully object to your Honor's statement to the jury that the contract in question was an Ohio contract and coupled with that the language which, in general, can be characterized as stating privity was not required between the parties. That has been the subject of your Honor's ruling——

The Court: Yes.

Mr. Doughty: ——and it is obligatory for me to renew it.

The Court: Any more?

Mr. Doughty: Yes, your Honor. The Court charged at length on the fact that the defendant would be liable if it foresaw or should have foreseen that this accident would have occurred.

As we view it, under New York law, if the plaintiff—let's say that the defendant could have foreseen it but if it was an open, obvious danger that then your Honor's language would not be applic ble.

The Court: All right. I tried to make that plain to the jury, and I might have—I will just say to you, Mr. Doughty, respectfully, that this charge is about as favorable to your client as it can be to stay within the law.

(22) Mr. Doughty: Yes, your Honor, and if I may continue.

The Court: I do not expect to satisfy you on that, but I have tried to frame it so as to be within the law.

Mr. Doughty: Yes, sir. Again we respectfully object and except to your Honor's charge that if the jury should find that the negligence of Corado and that of the defendant

concurred and that there was no negligence upon the part of the plaintiff, that then there would be a verdict for the plaintiff.

That, of course, is also the subject matter of one of our special requests, but I feel that in line with the special request we must except to it.

The Court: I gave that phase of it considerable study and I think that is the correct law.

Mr. Doughty: Then again, your Honor, in line with the initial objection, your Honor charged if the jury found for the plaintiff on either theory, that is, negligence or implied warranty, they could award damages, and we object to that portion of it pertaining to the implied warranty.

The Court: That is right.

Mr. Doughty: We have no special request other than those which we have previously submitted.

(23) The Court: Mr. Doughty, in fairness to you, I am going to charge, when this jury returns and you can except at this time if you think an exception is proper—I am going to say to the jury, that "I charge you when the goods are bought by description from a seller in Ohio who deals in goods of that description, whether he is the grower or manufacturer or not, there is an implied warranty that the goods shall be of merchantable quality and fit for the intended purposes or use."

I expect to charge it and I am taking it from your brief of the Ohio law.

Mr. Doughty: Your Honor is reading from Section 1315.16 of Baldwin's Ohio Code pertaining to "Sale in which Warranty is implied."

We do except unless your Honor gives the whole section —picking out a portion of the section and not giving another. We feel like it is prejudicial.

The Court: All right. Call the jury back.

Mr. Arnett: Could we join with Mr. Doughty. I think perhaps the whole thing should be——

The Court: You do not have to join with him. I am going to do it anyhow.

Mr. Arnett: I am sorry. I didn't know the Court was going to do that.

(24) (Whereupon, the jury returned to the jury box and the following proceedings were had in the presence of the jury.)

The Court: Ladies and gentlemen of the jury, Section 1315.16 of the Ohio law relating to sales in which warranty is implied reads as follows:—and keep in mind that the Ohio law controls on this phase of the litigation.

> "Subject to sections 1315.01 to 1315.76, inclusive, of the Revised Code and any law applicable thereto, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract to sell or a sale, except as follows:
>
> "(A) When the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment, whether he is the grower or manufacturer or not, there is an implied warranty that the goods shall be reasonably fit for such purpose.
>
> "(B) When the goods are bought by description from a seller who deals in goods of that description, whether he is the grower or manufacturer or not, there is an implied warranty that (25) the goods shall be of merchantable quality.
>
> "(C) If the buyer has examined the goods, there is no implied warranty as regards defects which such examination ought to have revealed.
>
> "(D) In the case of a contract to sell or a sale of a specified article under its patent or other trade name, there is no implied warranty as to its fitness for any particular purpose.

"(E) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

"(F) An express warranty or condition does not negative a warranty or condition implied under such sections unless inconsistent therewith."

For your convenience I have prepared a verdict form, ladies and gentlemen of the jury, which is as follows:

We find for the plaintiff or defendant. There is a blank line there which you will fill in. If you find for the plaintiff, you will fill in "Plaintiff"; if you find for the defendant, you will fill in "Defendant." If you find for the defendant ignore Question No. 2, but if you find for the plaintiff then you will go to Question No. 2, which is, "We find for the plaintiff and fix his"(26) damages at" blank dollars. And it is to be signed by the foreman.

When you retire select from your number a foreman and then begin your deliberations, and when you reach a verdict return with it and announce it in open court through your foreman, your verdict.

The two alternate jurors will please step aside, but do not talk about this case to anybody because you may be needed. In other words, observe the same instructions that were given to you at the beginning of the trial and throughout, and stay here until we adjourn, please.

Let the regular jury retire. Take a recess awaiting the jury.

(Whereupon, at 4:58 p. m., the jury retired for its deliberations, and the following proceedings were had in the absence of the jury.)

Mr. Doughty: The defendant respectfully excepts to the last supplemental charge pertaining to the Ohio law respecting implied warranty.

The Court: Take a recess.

In the
United States District Court
For the Eastern District of Tennessee,
Northern Division.

John Tracy,
Plaintiff,
versus
The Finn Equipment Company,
Defendant.
Civil Action.
No. 3769.

FINAL JUDGMENT ENTERED PURSUANT TO RULE 54 (b) OF THE FEDERAL RULES OF CIVIL PROCEDURE.

Upon a consideration of plaintiff's Motion in the Alternative, seeking, among other things, the entry, pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure, of a final judgment against the plaintiff and in favor of the defendant on plaintiff's claim for relief against the defendant based upon the breach of an implied warranty.

And the Court being of the opinion that the plaintiff, under applicable Ohio law, cannot maintain an action against the defendant for the breach of an implied warranty, and the Court expressly having determined that there is no just reason for delay, and having directed the entry of a final judgment on plaintiff's claim against the defendant for relief based upon the breach of an implied warranty,

It is, therefore, Ordered, Adjudged and Decreed that final judgment, pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure, be and the same is hereby entered against the plaintiff and in favor of the defendant

upon plaintiff's claim for relief against the defendant based upon the breach of an implied warranty.

The plaintiff, in accordance with Rule 73 of the Federal Rules of Civil Procedure, is allowed 30 days from and after the entry of this judgment within which to file a notice of appeal.

Pending further action by the United States Court of Appeals, Sixth Circuit, it is Ordered that all proceedings in this Court be and they are hereby stayed.

Enter:

s Robert L. Taylor,
Judge.

Zelenko & Elkind and
Foster D. Arnett and
Jack B. Draper,

By /s/ Jack B. Draper,
Of Counsel for Plaintiff.

Hodges, Doughty & Carson.

By .....
Of Counsel for Defendant.

Dated: January 6, 1960.

OPINION.

Filed May 9, 1961, Carl W. Reuss, Clerk.

Nos. 14217-8.

United States Court of Appeals
For the Sixth Circuit.

John Tracy, Plaintiff-Appellant, v. The Finn Equipment Company, Defendant-Appellee.	Appeals from the District Court of the United States for the Eastern District of Tennessee, Northern Division.

Decided May 9, 1961.

Before McAllister, Chief Judge, Simons, Senior Judge, and O'Sullivan, Circuit Judge.

Simons, Senior Judge. Tracy was employed as a landscape laborer by Meadowbrook Nurseries, Inc., a New Jersey corporation. On September 10, 1958, he was injured while operating a mulching machine which had been purchased by Meadowbrook, a month earlier, from The Finn Equipment Company, the defendant-appellee. Tracy is a citizen of New York, Finn is an Ohio corporation having a principal place of business in Tennessee. The machine was delivered to Finn at Brooklyn, New York, where Meadowbrook was engaged in landscaping work. On the day of the accident, Tracy had been assigned, as a laborer, for two weeks, and was injured while manually clearing a blower which had been clogged but had not been disengaged. He suffered severe injuries, including the required amputation of his left hand.

Tracy sought recovery on two theories, (1) negligence on the part of Finn in the design of the machine, in that it contained a hidden or latent hazard, which was the

proximate cause of his injuries and (2) breach of implied warranty of the safety of the machine for the use to which it was to be put. Finn denied negligence; denied the existence of implied warranty and asserted that if there was such warranty, it had not been breached, and, in any event, did not inure to Tracy's benefit.

Prior to the trial, Finn moved for a judgment on the pleadings or, for a partial summary judgment on the claim of breach of implied warranty. The motions were overruled, the case proceeded to trial, was submitted to the jury on both the negligence and the warranty counts and a general verdict returned for Tracy which simply stated that the jury found for the plaintiff and fixed his damages at $65,000. Neither party had requested a special verdict or had submitted interrogatories. Judgment for Tracy was entered by the Court. Finn moved for judgment notwithstanding the verdict, or in the alternative for a new trial. However, the District Judge found that he had erred in submitting the implied warranty count to the jury since, upon a reexamination of the applicable law, he concluded that such warranty did not extend to a corporate employee who was not a purchaser. While he overruled the motion for judgment N. O. V., he did set aside the verdict and granted a new trial.

In response, Tracy filed a motion asking the Court to set aside its order granting a new trial or, in the alternative, that the order be modified to permit application to this court for an interlocutory appeal, pursuant to Section 1292 (b), Tit. 28, U. S. C. A., based upon the breach of implied warranty so as to make possible an immediate appeal.

The parties had stipulated that the law of New York applied to the negligence phase of the litigation. The District Judge held that Ohio law applied to the implied warranty count because (under Ohio law), a warranty does not extend to a corporate employee who was not a

purchaser since there was no privity between the manufacturer and an employee of the purchaser. The Court declined to set aside its order granting a new trial but did modify it in order to make possible an application for an interlocutory decree. Two appeals have, however, been perfected and are here argued. Tracy urges that the verdict should be reinstated on both counts. He asserts that while the Judge was correct in holding that Ohio law determines the implied warranty issue, he was incorrect in holding that it does not extend to Tracy. Secondly, he urges that even if Tracy's claim on the implied warranty was improperly submitted to the jury, the Tennessee statutes make it mandatory that the verdict be upheld, since there was at least one good count correctly submitted to the jury and supported by substantial evidence, namely, the negligence count, and it is this contention that we must first consider, for the main appeal presents an issue that may be controlling of the entire controversy and may be stated as follows: In federal court litigation, in the state of Tennessee, in cases involving multiple claims, will a general verdict of the jury for the plaintiff be sustained by applying such general verdict to any of the claims for relief which are sound and supported by substantial evidence, even though other claims for relief may have been defective and improperly submitted to the jury, or not supported by substantial evidence?

The negligence count was deemed by the Court to have been submitted to the jury without error and supported by substantial evidence. Moreover, on this appeal, no error has been alleged concerning that claim.

The Tennessee statute here involved is Sec. 20-1317 of the Tennessee Code Annotated:

> "Verdict Applied to Good Count.
>
> If any counts in a declaration are good, a verdict for entire damages shall be applied to such good counts (Deriv. Act 1801, Ch. 6, Sec. 63)."

While the Act is in this respect procedural, the United States Supreme Court has postulated a policy that in diversity cases the federal courts must follow even the procedural rules of the state in which it sits where an application of a different rule would cause a substantial likelihood of a different result had the matter been tried in the state court. In **Guaranty Trust Co. v. York**, 326 U. S. 99, the Court indicated the broad effect to be given to **Erie Railroad Company v. Tompkins**, 304 U. S. 64. That case involved a suit brought in the district court, with jurisdiction based entirely upon diversity of citizenship, to enforce in equity a state created right. There it was said:

> "But since a federal court adjudicating a State-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the state, it cannot afford recovery if the right to recover is made unavailable by the State nor can it substantially affect the enforcement of the right as given by the State."

In **Byrd v. Blue Ridge Electric Cooperative**, 356 U. S. 525, the Court agreed that the **Erie** case supported the broad concept of **Guaranty Trust Company**, supra, that the federal court should conform as near as may be to state rules, even of form and mode, where the state rules may bear substantially on the question as to whether the litigation would come out one way in the federal court and another way in the state court. It qualified this principle, however, by holding that this may be so only in the absence of other considerations and found that distortion of the common-law judge-jury relationship was among such other considerations because of the command of the Seventh Amendment which requires that, in suits at common-law, the right of control by jury shall be preserved and no fact tried by a jury was to be otherwise re-examined in any court of the United States except according to the rules of the common-law. No federal issue is, however,

here involved and no prejudice to the defendant is here perceived. There was a jury trial, a verdict for the plaintiff supported by evidence and a judgment entered upon the verdict. The evidence that applied to the improper count was the same as that in support of the negligence contention, and prejudice is wanting.

Concededly, the Tennessee statute is of ancient vintage but the Tennessee courts have applied it in modern times. **Tennessee Central Railway Company v. Umenstetter,** 155 Tenn. 235 (1927); **Redding v. Hatcher,** 14 Tenn. App. 561, and we have quite recently followed their determination, as stating the applicable law of the state, in **Louisville & Nashville Railroad Co. v. Rochelle,** 252 F. 2d 730 (1958); **Atlantic Coastline Railroad Co. v. Smith,** 264 F. 2d 428 (1959).

It follows, from what we have said, that Tennessee law, both statutory and decisional, controls the issue in the main appeal, that the order granting a new trial must be set aside, the jury verdict reinstated, judgment entered for the plaintiff, and the interlocutory appeal dismissed. The case is remanded to the District Court for proceedings consistent with this opinion.

Reversed and remanded.

No. 14,217.

JUDGMENT.

May 9, 1961.

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded to the District Court for further proceedings consistent with the opinion herein.

Approved for entry:

s Charles C. Simons,
Senior U. S. Circuit Judge.

No. 14,218.

JUDGMENT.

May 9, 1961.

Appeal from the United States District Court for the Eastern District of Tennessee.

This Cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Tennessee, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded to the District Court for further proceedings consistent with the opinion herein.

Approved for entry:

s Charles C. Simons,
Senior U. S. Circuit Judge.

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No. 141

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

THE FINN EQUIPMENT COMPANY,
Petitioner,

vs.

JOHN TRACY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

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No. .....

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

THE FINN EQUIPMENT COMPANY,
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JOHN TRACY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit.

I.

STATEMENT OF THE CASE.

In its Petition for Writ of Certiorari, The Finn Equipment Company seeks to have this Court review a decision of the United States Court of Appeals for the Sixth Circuit, wherein it ordered a reinstatement of a general jury

verdict in favor of the respondent, John Tracy (pp. A-50-A-55 of Petition). The original action involved a damage suit wherein federal jurisdiction was conferred by reason of diversity of citizenship. **28 U. S. C., Section 1332.** The facts, briefly, are these:

On September 10, 1958, John Tracy, a laborer, employed by Meadowbrook Nurseries, Inc., of Englewood, New Jersey, while working for his employer in the State of New York, sustained a traumatic amputation of his left hand and forearm while operating a mulching machine. The machine was designed, manufactured, sold and delivered to Tracy's employer by petitioner, The Finn Equipment Company. The sale of the mulching machine was consummated in the State of Ohio.

The Finn Equipment Company is an Ohio corporation, with a principal place of business in Knoxville, Tennessee, where the original action was brought and the jury verdict rendered.

The action brought by John Tracy in the District Court was submitted to the jury on two theories: (1) The negligence of The Finn Equipment Company in the design and manufacture of the mulching machine, in that it contained a hidden or concealed danger which could not be discovered in the the exercise of ordinary care, as a proximate result of which John Tracy was injured (App. p. B-1), and (2) Breach of an implied warranty. The jury returned a general verdict in favor of John Tracy which simply stated that the jury found for the plaintiff and fixed his damages at $65,000 (App. p. B-2). Neither party requested a special verdict or submitted interrogatories.

The Finn Equipment Company filed a motion for judgment notwithstanding the verdict, or, in the alternative,

for a new trial (pp. A13-A23 of Petition). The District Judge, in ruling upon the motion, concluded that Tracy's claim for relief based upon negligence was properly submitted to the jury and was supported by substantial evidence. The District Judge was of the opinion, however, that he was in error in submitting the warranty count to the jury. Accordingly, the District Judge set aside the jury's general verdict in favor of Tracy and granted to Finn a new trial (pp. A23-A29 of Petition).

Thereupon, Tracy filed a motion asking the District Court to set aside its order granting a new trial, or in the alternative, that the order be modified to permit an application to the United States Court of Appeals for the Sixth Circuit for an interlocutory appeal pursuant to Section 1292 (b), Title 28, U. S. C. The District Court declined to set aside its order granting a new trial, but did modify its order to make possible an application for an interlocutory appeal (pp. A29-A30 of Petition).

An application for an interlocutory appeal was made, granted, and perfected to the United States Court of Appeals for the Sixth Circuit (pp. A30-A31 of Petition). To avoid a possible procedural hiatus, Tracy also perfected an appeal pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure (pp. A48-A49 of Petition).

In a carefully reasoned opinion reviewing the applicable Tennessee law, the United States Court of Appeals for the Sixth Circuit held that the general jury verdict for Tracy should be reinstated (pp. A50-A55 of Petition).

The Finn Equipment Company seeks by its Petition to have this Court review the action of the United States Court of Appeals for the Sixth Circuit.

II.

REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

A. There is no affirmative showing of prejudice to The Finn Equipment Company by reason of any alleged error by the District Court in submitting the warranty count of Tracy's complaint to the jury.

B. The decision of the United States Court of Appeals for the Sixth Circuit in the case at bar is not in conflict with decisions of the other Circuit Courts of Appeals.

C. The Tennessee General Verdict Statute (**Tennessee Code Annotated**, Section 20-1317), which the United States Court of Appeals for the Sixth Circuit held to be applicable in this diversity litigation, is in nowise unconstitutional.

III.

BRIEF AND ARGUMENT.

A. There Is No Affirmative Showing of Prejudice to The Finn Equipment Company by Reason of Any Alleged Error by the District Court in Submitting the Warranty Count of Tracy's Complaint to the Jury.

The Court of Appeals, in its opinion, found that the petitioner was in no way prejudiced by the submission to the jury of the warranty count of the complaint because, in the words of the Court:

> "The evidence that applied to the improper count was the same as that in support of the negligence contention, and prejudice is wanting."

The correctness of the Court's decision can be illustrated briefly as follows:

Both of Tracy's claims for relief required a finding by the jury that the mulching machine contained a hidden danger or defect and a further finding that Tracy was free from contributory negligence. As previously observed, claims for relief founded upon an implied warranty or merchantability and fitness, and upon negligence, were submitted to the jury. It is quite evident that the jury's general verdict was founded upon one of the following alternatives: Either the jury found for John Tracy on the negligence count, on the warranty claim, or on both. A closer analysis, however, will conclusively demonstrate that the jury must, of necessity, have found for Tracy on his negligence claim. If such a conclusion is made to appear, then any alleged error committed by the District Judge in submitting the warranty claim to the jury must

be disregarded, because it would not have affected the substantial rights of the parties. **(Rule 61 of the Federal Rules of Civil Procedure.)**

The District Court expressly ruled that the law of Ohio controlled Tracy's claim for relief based upon breach of implied warranty, and Tracy specifically predicated his claim upon the decision of the Ohio Court in **Di Vello v. Gardner Machine Co.**, 102 N. E. 2d 289, 293, in which the Court stated:

> ". . . this court is of the opinion that the sale of the grinding wheel carried with it an implied warranty of merchantability and fit (sic) for the usages designed and that such warranty extended to the workman of the vendee who was injured in its ordinary use because of a **latent defect,** and **in the absence of contributory negligence** such workman could recover on the basis of a breach of warranty against the party who sold the wheel to his employer." (Emphasis supplied.)

John Tracy has always acknowledged that his principal burdens, both under the negligence count (**Campo v. Scofield,** 301 N. Y. 468, 95 N. E. 2d 802 (1950)), and the warranty count, was to establish that the machine contained a hidden danger or latent defect, that The Finn Equipment Company failed to guard against hidden defects and failed to give notice of concealed dangers, and that he, John Tracy, was free from contributory negligence. It thus appears that the warranty and negligence counts or claims for relief contain identical, essential, fact burdens, and the **same** evidence supported both.

The warranty claim, however, contained an additional element, *i. e.*, the problem of privity of contract. This element, however, is a question of law. Therefore, if the

jury did find for John Tracy on the breach of warranty claim, we are nevertheless irresistibly compelled to the conclusion that the verdict also rested upon the negligence claim, because both claims have the same fact premises.

If the District Court did, in fact, err in submitting the warranty count to the jury, the error was not prejudicial and could not have affected the general verdict. The evidence which supported the warranty count fully supported the negligence count. The evidence in support of both of Tracy's claims for relief was **identical**. Therefore, since it does not affirmatively appear that any alleged error in submitting the warranty count to the jury affected the general verdict, prejudice to the Petitioner is wanting, and under the doctrine of substantial justice and harmless error, the Court of Appeals correctly ordered a reinstatement of the general jury verdict for the respondent, John Tracy.

B. The Decision of the United States Court of Appeals for the Sixth Circuit in the Case at Bar Is Not in Conflict With Decisions of the Other Circuit Courts of Appeals.

On Pages 14, 15, and 16 of its Petition, The Finn Equipment Company insists that the decision of the Court of Appeals for the Sixth Circuit in the case at bar is in conflict with the decisions of Court of Appeals for other Circuits. The short, but respectful, answer to this insistence is readily apparent In **none** of the cases cited by Finn in its Petition on Pages 14, 15, and 16, were the other Courts of Appeals considering the law of the State of Tennessee, and, more specifically, the Tennessee General Verdict Statute (T. C. A. 20-1317). In **not one** of the cited cases was a general verdict statute such as the one in question presented for appellate consideration. The Petition filed by

Finn presents cases not in point, in that **none** of them construe or apply the Tennessee statute in question. Tracy relies upon, and would respectfully invite this Court's attention to, certain prior reported decisions of the United States Court of Appeals for the Sixth Circuit, wherein it favorably considered the Tennessee General Verdict Statute (T. C. A. 20-1317). See **Louisville & Nashville R. R. Co. v. Rochelle**, 252 F. 2d 730 (1958); **Atlantic Coastline R. Co. v. Smith**, 264 F. 2d 428 (1959).

Inasmuch as the decision of the Court of Appeals for the Sixth Circuit involved the application of a specific Tennessee statute (T. C. A. 20-1317), its decision in the premises obviously **cannot** be in conflict with the decisions of the Courts of Appeals for other Circuits.

C. **The Tennessee General Verdict Statute (Tennessee Code Annotated, Section 20-1317), Which the United States Court of Appeals for the Sixth Circuit Held to Be Applicable in This Diversity Litigation, Is in Nowise Unconstitutional.**

The Tennessee General Verdict Statute (T. C. A. 20-1317) is derivative of an act of the Tennessee General Assembly of 1801. Since its enactment, it has been applied and followed by the courts on innumerable occasions, during which time its constitutionality has **never** been challenged. See for example, **Anderson v. Read**, 2 Tenn. 205 (1812); **Pursell v. Archer**, 7 Tenn. 317 (1824); **Tennessee Central Railway Co., v. Umenstetter**, 155 Tenn. 235 (1927); **Redding v. Hatcher**, 14 Tenn. App. 561 (1932); **Wesco Paving Co. v. Nash**, 35 Tenn. App. 409, 245 S. W. 2d 782 (1951).

It long has been recognized that the Seventh Amendment to the United States Constitution was never in-

tended to preserve every facet of form and procedure incident to a jury trial as under the English common law; but rather was intended to protect the right of litigants to have fact issues determined by the jury, and legal issues determined by the court. **Walker v. New Mexico & S. P. R. Co.**, 165 U. S. 593, 17 S. Ct. 421, 41 L. Ed. 837 (1897); **Matter of Walter Peterson**, 253 U. S. 300, 40 S. Ct. 543, 64 L. Ed. 919 (1920).

In conformity both with its prior decisions involving Tennessee litigation [**Louisville & Nashville R. R. Co. v. Rochelle**, 252 F. 2d 730 (1958); **Atlantic Coastline R. Co. v. Smith**, 264 F. 2d 428 (1959)], and with the general rule of law announced by this Court in the case of **Byrd v. Blue Ridge Electric Co-op, Inc.**, 356 U. S. 525, 78 S. Ct. 893, 2 L. Ed. 953 (1958), the United States Court of Appeals for the Sixth Circuit held, in the case at bar, that the Tennessee General Verdict Statute (Tennessee Code Annotated, Section 20-1317) is applicable in diversity litigation in the federal district courts in the State of Tennessee.

John Tracy, therefore, respectfully submits that the Tennessee General Verdict Statute is in no way violative of the Petitioner's constitutional rights, that it is applicable in federal court diversity litigation in the State of Tennessee, and that the decision of the United States Court of Appeals for the Sixth Circuit in the case at bar was eminently correct in its ruling that the jury's general verdict should be reinstated.

IV.

CONCLUSION.

For the reasons herein stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN TRACY,

By .....
FOSTER D. ARNETT.

Of Counsel:

FOSTER D. ARNETT and
JACK B. DRAPER, and
ZELENKO & ELKIND.

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ORDER.

(Filed October 28, 1959.)

This cause came on to be heard upon plaintiff's two Motions to Amend, and the Court having considered each of said motions and having sustained and allowed the same, it is Ordered that the complaint be and the same is hereby amended by adding the following language as a third paragraph in Section IV of the complaint

> "Plaintiff avers that in addition to the foregoing acts and omissions complained of, the defendant, Finn Equipment Company, was negligent and careless in failing to warn the plaintiff of the hidden and concealed dangers inherent in the operation of the machine; and particularly does the plaintiff charge the defendant with failure to exercise due care in not placing an appropriate warning notice on the exterior portion of the mulching machine at or near the clean-out door."

Approved for Entry

/s/ Robert L. Taylor,
Judge.

O. K.

Zelenko & Elkind and Foster D. Arnett, Esquires,

By /s/ Foster D. Arnett,
Attorneys for Plaintiff.

Hodges, Doughty & Carson,

By /s/ J. H. Doughty,
Attorneys for Defendant.

In the
United States District Court
For the Eastern District of Tennessee,
Northern Division.

John Tracy vs. The Finn Equipment Company.	Civil Action No. 3769.

VERDICT FORM.

(1) We find for the Plaintiff
Plaintiff or Defendant

(If you find for the defendant, ignore question No. Two (2).)

(2) We find for the plaintiff and fix his damages at $65,000.00.

/s/ Vaughn L. York,
Foreman.

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